Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

In Re:
Al Copeland Enterprises, Inc.,
Debtor

George Samaras,
Petitioner,

v.

AFC Enterprises, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a bankruptcy case commenced under Chapter 11 (11 U.S.C. §§ 1100 *et seq.*), at the request of the parties, the bankruptcy court ordered the parties to litigate Petitioner's pre-petition breach of contract claim against Respondent in a state court exercising concurrent jurisdiction. The judgment would be treated as a liquidated claim under Respondent's reorganization Plan.

Petitioner recovered a final non-appealable judgment in the state court that included an award of attorney's fees and post-judgment interest. Because the state court declined to consider the effects of bankruptcy law, the bankruptcy court set aside the attorney's fees and interest components of the judgment, disallowing these items as a claim in the bankruptcy case.

> Does the Full Faith and Credit Act, 28 U.S.C. § 1738 preclude the bankruptcy court's re-litigating issues fully and finally decided by a state court, even though the judgment fails to apply federal law?
>
> Having completely ceded jurisdiction to the state court, can FED. R. CIV. P. 60(b)(6) (as incorporated in BANKR. R. 9024) be used to revise a state court judgment that otherwise must be given full faith and credit under 28 U.S.C. § 1738?

CERTIFICATE OF INTERESTED PARTIES AND COUNSEL

Pursuant to U.S.S.C. Rule 14.1(b), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. This representation is made so that the Justices of this Court may evaluate possible disqualification or recusal.

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*AFC Enterprises, Inc. is a holding company and the parent entity for the brand names Church's Chicken, Popeyes Chicken & Biscuits, Seattle's Best Coffee, Cinnabon Cinnamon Rolls, Chesapeake Bagels Bakery & Cafe and Torrefazione Italia

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OPINIONS BELOW

The official reports of court decisions relevant to this Petition are:

1. *America's Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617 (Tex.App.–San Antonio 1996, writ denied).[1]

2. *Samaras v. America's Favorite Chicken Co., Inc.*, 153 F.3d 268 (5th Cir. 1998), *reh'g overruled*, October 15, 1998.[2]

STATEMENT OF JURISDICTION

Petitioner seeks review by writ of certiorari of a decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 16, 1998. Petitioner's Motion for Rehearing was denied by written order entered October 15, 1998. The original basis for the assertion of jurisdiction in the federal court was Respondent's voluntary petition in bankruptcy under Title 11 of the United States Code, for protection under Chapter 11 (11 U.S.C. §§ 100 *et seq.*) as a debtor-in-possession.

The Supreme Court of the United States has jurisdiction of this Petition pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] App. 8.

[2] App. 4.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES MATERIAL TO THIS PETITION

United States Constitution, art. IV, § 1:

Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be Proved and the Effect thereof.

Title 28 United States Code, § 1738:

State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646. 62 Stat. 947).

Title 28, United States Code, § 2072

Rules of procedure and evidence; power to prescribe.

(a)— The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100-702, Title IV, § 401(a), Nov. 19, 1998, 102 Stat. 4648, and amended Pub.L. 101-650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

Federal Rules of Civil Procedure, Rule 60:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representatives from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the

operation of the judgment.

. . .

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987).

STATEMENT OF THE CASE

Petitioner seeks to review a judgment of the United States Court of Appeals for the Fifth Circuit, affirming decisions of the bankruptcy court and the United States District Court for the Western District of Texas, disallowing Petitioner's recovery under a final judgment of a Texas state court.

Petitioner originally sued Respondent's predecessor, Al Copeland Enterprises, Inc. in a state court in Texas, on a breach of contract claim. While the original state suit was pending, Copeland filed for Chapter 11 bankruptcy protection in the United States District Court for the Western District of Texas, Austin Division. Failing to get a plan of reorganization confirmed, Copeland was taken over by its principal creditors. The creditors organized a new entity known as America's Favorite Chicken Company ("AFC").[3] AFC succeeded in getting a reorganization plan confirmed,[4] under which it agreed to pay certain claims of creditors, while others pending, including Petitioner's, were to be litigated.

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[3] During the progress of this case, the name was changed formally to AFC Enterprises, Inc.

[4] Debtor's Fourth Amended Plan of Reorganization was approved by the bankruptcy court by order signed October 22, 1992 (*See* App. 5).

AFC agreed to the entry of a final order of April 7, 1993[5] permitting the parties to liquidate Petitioner's claim to a final judgment in the state court suit. The Order provided that upon exhaustion of any appeals or petition for certiorari, the liquidated amount, if any, of Petitioner's claim would be classified as a Class 5 Large Trade Claim and deemed allowed under Section 5.02 of the Plan. As so classified, it would be payable at the rate of 85% of the liquidated amount of the judgment. In its April 1993 order, the bankruptcy court did not provide any language retaining jurisdiction over the claim or the underlying lawsuit.

AFC was substituted for Copeland as the real party in interest in the state court. Following a jury trial on the merits, the state district court rendered judgment on March 3, 1995, in favor of Samaras against AFC, in the amount of $2,207,749.70 plus court costs. Of the judgment amount, $1,522,586 was actual damages and the balance of $685,163.70 was comprised of attorney's fees, plus court costs of $1015. The entire judgment bears interest at the Texas post-judgment statutory rate of 10% per annum, TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1997 Supp.).

Respondent appealed the state court's judgment to the Court of Appeals of Texas, Fourth District (San Antonio, Texas). Upon that court's affirmance, AFC sought further review by writ of error in the Supreme Court of Texas. Texas' highest court denied review and the judgment became final. *America's Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617 (Tex. App.–San Antonio 1996, writ denied).[6]

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[5] App. 6.

[6] AFC eventually paid the damage portion of the judgment, less the 15% reduction specified under its reorganization

The Texas Court of Appeals concluded it did not have jurisdiction to decide the bankruptcy law question of whether interest and attorney's fees could be awarded against a Chapter 11 debtor. 929 S.W.2d at 630.

AFC did not petition this Court for review of the judgment by writ of certiorari. Instead, it attacked the state court's judgment collaterally, by motion in the bankruptcy court, where its reorganization was still pending. Exercising its presumed authority under FED. R. CIV. P. 60(b)[7] the bankruptcy court granted relief in the form of an order determining Petitioner's claim (as amended) and granting reconsideration of or relief from the prior order entered April 7, 1993.

The bankruptcy court's order disallowed Petitioner's recovery of the post-judgment interest, court costs and attorney fees components awarded by the state court. The bankruptcy judge announced his ruling orally on August 26, 1997[8] and subsequently entered it of record on September 8, 1997.[9] The District Court affirmed the order, without written opinion or additional findings, by order entered January 15, 1998.[10] A panel of the United States Court of Appeals for the Fifth Circuit affirmed the judgment by written opinion entered

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plan.

[7] FED. R. CIV. P. 60(b) is made applicable to bankruptcy proceedings by BANKR. R. 9024.

[8] App. 1.

[9] App. 2.

[10] App. 3.

September 16, 1998, and denied rehearing by order entered October 15, 1998.

ARGUMENT FOR GRANTING THE WRIT

This case presents an important question concerning the limits of jurisdiction of the federal courts in light of the Full Faith and Credit Act 28 U.S.C. § 1738. In substance, the issue is: having ceded exclusive jurisdiction to the state court at the parties' request, can the bankruptcy court redetermine issues which the state court expressly declined to decide, but which were subsumed by the state court's final judgment?

Petitioner believes that the district court and court of appeals overlooked the important constitutional and statutory constraints governing the exercise of their limited grant of jurisdiction. The court of appeals opinion of September 16, 1998 does not address the application of the Full Faith and Credit Statute. As a consequence, the court's decision places it in conflict with the Constitution, the decisions of this Court and the several circuit courts of appeal, as well as several bankruptcy courts that have considered the issue.

Section 1738 is Congress' embodiment of the constitutional mandate that the States must give recognition and effect to the judgments of their sister States. U.S. CONST., art. IV, § 1. Although the Constitution itself does not impose the same burden upon the United States, Congress has determined that the federal courts will be similarly bound. *Americana of Puerto Rico, Inc. v. Kaplus*, 240 F.Supp. 854 (D.C.N.J. 1965), *aff'd*, 368 F.2d 431 (1st Cir. 1996), *cert. denied*, 386 U.S. 943 (1967). Hence, Section 1738 provides that a federal district court (including the bankruptcy court as an extension thereof) has no authority to review the final

judgments of a state court in judicial proceedings. *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Kapp v. Naturelle, Inc.*, 611 F.2d 703 (8th Cir. 1979); *In re: Sundale Assocs., Ltd.*, 48 B.R. 288 (S.D. Fla. 1984), *appeal dism'd*, 786 F.2d 1456 (11th Cir. 1986); *In re: Mastercraft Record Plating*, 39 B.R. 654 (S.D.N.Y. 1984).

Petitioner believes that following its ceding resolution of the case to the state court, the bankruptcy court was obliged to apply the statute to this case. In not requiring the district court to adhere to the statute, the Fifth Circuit has materially misapplied the law as mandated by U.S. CONST. art. IV, § 1. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984); *Kelleran v. Andrijevic*, 825 F.2d 692, 694 (2d Cir. 1987); *In re: First Actuarial Corp. of Illinois*, 182 B.R. 178 (Bankr. W.D. Mich. 1995); *Bowers v. Connecticut Nat'l Bank*, 78 B.R. 388 (D.C. Conn. 1987); *In re: Farrell*, 27 B.R. 241, 243 (Bankr. E.D.N.Y. 1982).

The court's opinion in this case conflicts not only with the case law of other circuits, but even with that of the Fifth Circuit itself. *Matter of Reitnauer, Texas Exotic Feline Found., Inc.*, 152 F.3d 341, 343-44 (5th Cir. 1998); *U.S. v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994); *Matter of Brady, Texas Mun. Gas Corp.*, 936 F.2d 212, 220 (5th Cir. 1991) ("*Brady*"). As the *Brady* court correctly observed, quoting this Court's decision in *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 481-82 (1982):

> It has long been established that [28 U.S.C.] § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a

> federal court to accept the rules chosen by the state from which the judgment is taken.

The court of appeals and lower courts ignored this rule. Under Texas law, it is the mandate and not the court's opinion that controls. In this case, the Texas appellate court had three choices: (i) reverse the trial court and render judgment deleting the award of attorney's fees, costs and interest; (ii) vacate that portion of the judgment and remand the case to the trial court with directions to consider the federal law issues; or (iii) affirm the trial court's award of these items. The Texas appeals court chose the latter course. Petitioner is either entitled to the attorney's fees, costs and interest, or he is not. By affirming the trial court, the Texas court of appeals held that he is so entitled, and its mandate cannot be ignored, even if wrong.

Indisputably, concurrent jurisdiction to liquidate Petitioner's claim originally existed between the bankruptcy court and the state court. *Brady supra*, 936 F.2d at 218. Thus, either court could have proceeded to liquidate the claim. The only aspect of the bankruptcy case over which the bankruptcy court had exclusive jurisdiction was the "petition itself." *Id*. This means that, in the context of a Chapter 11 case, the bankruptcy court had exclusive jurisdiction to confirm or reject the reorganization plan and for the purpose of effectuating its decree of confirmation. This is the only subject matter jurisdiction retained in the 1993 Order–the power to liquidate Samaras' claim was ceded exclusively to the state court. However, once the claim was liquidated, the bankruptcy court exclusively could effectuate the state court judgment through the reorganization plan.

The court of appeals held that ". . . in the 1993 Order, the bankruptcy court did reserve jurisdiction over Samaras'

claim." 153 F.3d at 270. The court's reasoning does not support this conclusion. The next sentence of the opinion contradicts this conclusion: "The order provided that *once liquidated*, Samaras's claim would be deemed allowed under AFC's Reorganization Plan and would be paid accordingly." *Id.*, (emphasis added). The court continues, noting that "[t]he bankruptcy court . . . had jurisdiction over the administration of the . . . plan, including the processing of Samaras's *liquidated claim* thereunder." *Id.*, (emphasis added). That is true, but it does not follow that the bankruptcy court retained jurisdiction to re-litigate issues subsumed by the claim liquidation process in the state court. The only jurisdiction retained by the bankruptcy court in regard to Samaras's claim was to process the *liquidated claim*; the bankruptcy court did not retain jurisdiction to *liquidate* the claim itself.

To put it another way, the bankruptcy court re-acquired jurisdiction only because the claim *was* liquidated. Therefore, as the bankruptcy court lacked jurisdiction, the court of appeals' conclusion that the bankruptcy judge did not abuse his discretion in granting relief under FED. R. CIV. P. 60(b) is incorrect. The rule does not create jurisdiction where it never existed or, at least, where it no longer exists.

The Fifth Circuit's decision sanctions a significant departure from the accepted and usual course of judicial proceedings and places it in conflict with the decisions of other courts of appeals on an important question of federal jurisdiction. The Supreme Court should grant certiorari to review this decision, and the Fifth Circuit's holding should be reversed.

ARGUMENTS AND AUTHORITIES

FIRST ARGUMENT

The bankruptcy court and the court of appeals failed to give full faith and credit to the state court judgment

As stated in *Brady, supra*, the bankruptcy court had exclusive jurisdiction only "over the petition." This subject-matter jurisdiction could not be ceded to the state courts. All other aspects of Samaras' claim could be and were, in fact, ceded to the state court. Having reduced his claim to judgment in the state court, because of the constitutional pre-eminency of the bankruptcy court's jurisdiction, Samaras could look only to that court to enforce his judgment, and could not use any of the means available under state law. But that fact does not mean that the bankruptcy court was free to revise the state court judgment. Had Samaras obtained his judgment prior to the entry of the order for relief in the bankruptcy court, there would be no question that the bankruptcy court would be bound under § 1738 to give it full faith and credit. *Heiser v. Woodruff*, 327 U.S. 726 (1946). It should make no difference for purposes of § 1738 that the judgment was obtained *after* the order for relief where, as here, the bankruptcy court explicitly and completely ceded jurisdiction to the state court.

In its opinion of September 16, 1998, the court of appeals did not address the application of the Full Faith and Credit Statute, 28 U.S.C. § 1738. That statute provides that a federal district court has no authority to review the final judgments of a state court in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Samaras believes there is no reason the statute should not have application to the facts of this case. *Heiser v. Woodruff*, 327

U.S. 726 (1946); *see also Brady*, 936 F.2d 212 (5th Cir. 1991). In dealing with Samaras' argument that the bankruptcy court abused its discretion under Rule 60(b)(6), Samaras believes the court did not address the claim-preclusive effect of the state court judgment.

The essence of the court's holding is that because the state courts did not dispose of the attorney's fees and interest claims, AFC did not waive its right to complain of their ruling–by collateral attack if necessary. This holding does not consider the distinction under Texas law between the mandate (the appellate court's judgment) and the opinion (expressing the reasons for the court's decision). It is contrary to law as established by this court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Under Texas law, it is the judgment, not the court's opinion that controls for purposes of claim-preclusion or *res judicata*. *City of Dallas v. Dixon*, 365 S.W.2d 919, 926 (Tex. 1963), *rev'd on other grounds*, 377 U.S. 408 (1964). In the state court proceedings, the district (trial) court rendered judgment for Samaras on his claims for attorney's fees and interest. That judgment was affirmed by the intermediate appellate court whose mandate is clear and unambiguous. Based upon *City of Dallas v. Dixon, supra*, the mandate of the state court of appeals is the sole point of reference to determine what claims or issues have been litigated. *See also Kidd v. McCracken*, 150 S.W. 885, 887 (Tex. 1912) and 6 MCDONALD, TEXAS CIVIL PRACTICE § 21:2 (1992).

AFC claimed in the state courts that it was not liable for attorney's fees or interest because (a) it did not breach an enforceable contract with Samaras and (b) even if it did, applicable federal law precluded recovery of these items.

Whether correct or incorrect, the state courts *decided* both issues adversely to AFC. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). Under Texas law, AFC could not re-litigate either issue, and certainly not by the collateral attack it made in this instance. Unless the state court's judgment was void for lack of jurisdiction–a claim which has not been made–the full faith and credit statute absolutely prohibited the bankruptcy court from reaching a different result. *Matter of Reitnauer, Texas Exotic Feline Found., Inc.*, 152 F.3d 341, 343-44 (5th Cir. 1998); *U.S. v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

SECOND ARGUMENT

The bankruptcy court did not retain jurisdiction to re-litigate the claim liquidation issues

There are two distinct possible bases for the lower court's holding: (1) the retention clause in the Fourth Amended Plan of Reorganization or (2) the 1993 Order. A careful reading of the quoted portions of the opinion reveals that the court of appeals has erroneously melded these two orders. Samaras submits that the court of appeals erred in concluding that either of the orders separately, or taken together, constitute any grounds for re-vesting jurisdiction in the bankruptcy court.

Petitioner submits that the appeals court's opinion confuses the concepts of liquidation and determination (*i.e.*, adjudication of the claim) on the one hand, with the residual power to enforce (*i.e.*, administer) the plan and the claim after it has been elsewhere determined, on the other hand. Such alternate means of liquidation is precisely what happened here–the parties contemplated resolution of the claim in a

forum other than bankruptcy court. Thus, the court was correct in holding that the bankruptcy judge did not envision his doing anything more than plugging in the state court judgment to the plan–a purely mechanical *administrative* process. However, the court did not retain any *adjudicatory* powers over the disputed [and now liquidated] claim, only the means to enforce the plan as it would enforce any other final judgment.

The distinction is crucial: as the bankruptcy court had no power to re-examine the state court's holdings, there was no authority to change, alter, review, revise or otherwise revisit the 1993 Order under the guise of a Rule 60(b) motion. The bankruptcy court was, in effect, either (a) condoning a collateral attack on the state court's final judgment or (b) revising its own 1993 Order to do what AFC neglected (consciously or unconsciously) to do when it crafted that Order.

a. The reorganization plan delegated authority to liquidate the claim.

Addressing first the relevant provisions of the plan,[11] Samaras believes the court of appeals misread the effect of the retention clause found in Section 9.04, which provides as follows:

> Section 9.04. Retention of Jurisdiction. Notwithstanding entry of the Confirmation Order or the Effective Date having occurred, the Bankruptcy Court, *to the extent*, permitted

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[11] *See* App. 5, Excerpts from Fourth Amended Plan of Reorganization.

> and subject to the discretion granted under the applicable sections of Title 28 of the United States Code, will retain jurisdiction to determine (a) any *Disputed Claims* . . . (f) to determine any and all applications, Claims, Interests, adversary proceedings and contested or litigated matters pending on the Effective Date as contemplated in the Plan, (g) to allow, disallow, estimate, liquidate or determine any Claim or Interest (including, without limitation, *Claims that are either not Allowed Claims or Disputed Claims*) and to enter or enforce any order requiring the filing of any such Claim before a particular date, . . . (emphasis added).

The retention clause employs the defined term "Disputed Claims" which means:

> Section 1.01. Definitions.
> * * *
> 'Disputed Claim' shall mean a Claim, . . . provided however, that in the event that the Bankruptcy Court or the Plan permits, or the Bankruptcy Code requires, a Claim to be liquidated or allowed in a forum other than the Bankruptcy Court then such Claim shall be a Disputed Claim *until liquidated or allowed by a Final Order or by agreement of the parties*. (italicized emphasis added).[12]

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[12] "Final Order" is likewise a defined term. Simply stated, it means a judgment of a court that is no longer appealable (*See* App. 5 [Page 6]).

The plan provides with respect to such claims:

> Section 6.07. Disputed Claims. (a) Except with respect to those Claims the holders of which have and preserve the right to liquidation of such Claims before a court other than the Bankruptcy Court pursuant to 28 U.S.C. § 157(b)(5), all Disputed Claims shall be liquidated and determined, and allowed or disallowed, by the Bankruptcy Court, subject to the discretion granted under the applicable sections of Title 28 of the United States Code.

The clear and indisputable intent of the plan was for the bankruptcy court to retain adjudicative jurisdiction over a Disputed Claim *unless* some other means was established for liquidating and determining such claim. Under 28 U.S.C. § 157(c), the bankruptcy court has the statutory authority to cede its jurisdiction to another court. Once the bankruptcy court did give up its power to adjudicate the claim, there was no statutory authority for it to reclaim that power.

b. The 1993 Order does not retain residual jurisdiction

The plan provisions must be read in conjunction with the April 1993 Order that provides:

> IT IS THEREFORE ORDERED that the parties to the foregoing lawsuit may obtain a judgment, and exhaust any appeals or writs of certiorari relating to such judgment.
>
> IT IS FURTHER ORDERED that upon the exhaustion of any appeals or writs of

> certiorari or in the event of a settlement, the *liquidated amount*, if any, or [sic] such judgment shall be classified as a Class 5 Large Trade Claim, and *shall be deemed allowed* under Section 5.02 of the Debtor's Fourth Amended Plan of Reorganization as approved by the Court by Order signed October 22, 1992, *and such claim shall be paid* in accordance with Section 5.02 of the Plan.[13]

Petitioner submits the court of appeals erred in holding that the 1993 Order retained jurisdiction. There is clearly no such language in the 1993 order–it says only that the "liquidated amount" of such claim "shall be paid" in accordance with Section 5.02 of the plan. There simply is no way to stretch the 1993 Order into a conditional decree, or one with an implied reservation of legal or equitable powers to modify the state courts' decisions. The Order was an absolute delegation of power to the state courts, and one which is totally consistent with the scheme created by the plan for disposition of Disputed Claims.

c. Reservation of jurisdiction may not be implied through the doctrine of judicial abstention

The court of appeals held–incorrectly, Petitioner believes–that the bankruptcy court did not explicitly state the basis for its order disallowing the attorney's fees, interest and costs elements of the state court judgment. 153 F.3d at 270. In the oral recitation of his findings, the bankruptcy judge expressly relied upon the holding in *Silverman v. Browning*, 414 F.Supp. 80, 85 (D. Conn. 1976), *aff'd*, 429

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[13] App. 6; emphasis added.

U.S. 876 (1976) ("*Silverman II*").[14] In *Silverman II*, the three-judge district court considered a Connecticut state court rule which effectively barred a New York lawyer from representing the plaintiff in a medical malpractice suit. The three judge panel initially deferred ruling on the constitutionality of the Act, to afford the Connecticut Supreme Court the opportunity to consider the plaintiff's arguments, but expressly retained jurisdiction "pending the final outcome of the plaintiff's appellate application to the State Supreme Court." *Silverman v. Browning*, 359 F.Supp. 173, 176-77 (D. Conn. 1972) ("*Silverman I*"). Only after the Connecticut courts declined to issue a judgment on the merits, did the federal court resume exercise of its jurisdiction.

Although not articulated by the bankruptcy court as precedent for its ruling in this case, the court of appeals did specifically consider the effect of *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 413 (1964).[15] Unlike this case, the *England* plaintiffs had not voluntarily delegated to the state court the decision of their federal claims. *England*, 375 U.S. at 415. Indeed, *England* recognized that a party may, as here, voluntarily forego his right to return to the federal courts after a state court makes its ruling. *Id.* at 417-18, citing *NAACP v. Button*, 371 U.S. 415, 427-28 (1963). The requirements of *England* are clear: there must be an explicit expression to the state court of the litigant's intent to return to federal court in the event of an adverse state court determination of its federal rights and the party must not voluntarily litigate federal claims or defenses that would otherwise be preserved for federal adjudication. *England*, 375 U.S. at 420.

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[14] App. 1, [Page 51].

[15] *See* 153 F.3d at 270.

There are no comparable aspects between this case and the *England* and *Silverman II* cases. In both of those earlier decisions, the federal courts could not deny the plaintiffs' right to have their federal law claims heard by a federal court. In the interest of comity and judicial economy–and in avoiding the possibility of having to declare state laws unconstitutional–the federal courts could, at most, postpone the exercise of their jurisdiction. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). In both instances, the courts ordered the plaintiffs to resort first to the state courts, a forum which they clearly would have preferred to avoid. The federal district courts in *England* and *Silverman II* could force the plaintiffs to go first to state court only with the express or implied promise that they could, if necessary, return to federal court for a hearing on their federal law claims. In this case, AFC was not forced to go into state court–it chose that forum voluntarily. There was neither an express nor an implied promise of the bankruptcy court to hear AFC's claims, nor was any necessary.[16] As discussed in Petitioner's First Argument, *supra*, the state court judgment subsumed and decided those claims. As such, this case is governed by the principles established in *NAACP v. Button, supra*, 371 U.S. at 427-28; *Harrison v. NAACP, supra*, 360 U.S. at 177.

In this case, the court of appeals found it unnecessary to consider Petitioner's contention that an abstaining court may not reclaim the case in the absence of an express reservation of jurisdiction.[17] As authority for its conclusion,

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[16] In denying reconsideration of the 1993 Order, the Bankruptcy Court's 1997 Order reiterated that it had delegated the case to the state court to decide the claim for all purposes. (App. 7).

[17] 153 F.3d at 270.

the court of appeals cited[18] *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal Virginia*, 135 F.3d 275 (4th Cir. 1998) ("*Front Royal VIII*"). As is the case with *Silverman* and *England*, Petitioner believes *Front Royal VIII* is distinguishable. It is true that the Fourth Circuit, in a footnote, suggests that there is no waiver of *England*-type rights, even where there is no express reservation of rights, and the state courts refuse to reach federal claims out of a concern for comity.[19] The holding is, under the facts of the case, *obiter dictum* because the plaintiffs had not voluntarily delegated to the state court the decision of their federal constitutional claims. Just as the Fifth Circuit did in *United Serv. Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964), the *Front Royal VIII* court's prior opinion, 945 F.2d 760 ("*Front Royal V*") expressly instructed the district court to retain jurisdiction pending the outcome of state court proceedings. 135 F.3d at 278.[20] There simply is no comparable language in the April 1993 Order.

In summary, the bankruptcy court's delegation of Petitioner's claim was a statutory action, not a judicial

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[18] *Id.*

[19] *Front Royal VIII*, 135 F.3d at 283-84, n.4.

[20] *Delaney* is factually similar. In an earlier *en banc* decision, the Fifth Circuit abstained from consideration of certain state law issues, and instructed the plaintiff-appellant to institute the declaratory judgment proceeding in the state court. In deferring to the state courts for a ruling, the Fifth Circuit held "This Court will retain jurisdiction for the purpose of taking such further action as may be required." *Delaney*, 328 F.2d at 485. In fact, the same scenario occurred in the other case cited by the court of appeals. *See Ivy Club v. Edwards*, 943 F.2d 270, 283 (3rd Cir. 1991) *cert. denied, sub nom Del Tufo v. Ivy Club*, 503 U.S. 914 (1992).

abstention as in *England* or *Silverman I*. The refusal of the state court to apply bankruptcy law is no different from applying it erroneously.[21] Under *NAACP v. Button*, AFC's remedy was not in the bankruptcy court. It should have filed an application for a writ of certiorari in the United States Supreme Court to correct the erroneous holding of the Texas Court of Appeals. There are no extraordinary circumstances to excuse AFC's failure to petition this Court for certiorari. Accordingly, the bankruptcy court did not have any implied jurisdiction to revisit the state court judgment.

THIRD ARGUMENT

FED. R. CIV. P. 60(b) and BANKR. R. 9024 do not confer limitless grants of equitable jurisdiction

The duty of the bankruptcy court to be governed by the state appellate court mandate imposed by 28 U.S.C. § 1738, also precludes relief under BANKR. R. 9024. FED. R. CIV. P. 60(b)(6) and Bankr. R. 9024 cannot be used to mount a collateral attack on a state court judgment. *In re: Universal Display & Sign Co.*, 541 F.2d 142, 144 (3rd Cir. 1976); *Bankers Mortgage Co. v. U.S.*, 423 F.2d 73, 78 (5th Cir. 1970). Nor can these rules be used as a substitute for direct appeal. *Crosby v. Mills*, 413 F.2d 1273, 1276 (10th Cir. 1969).

The Respondent-debtor wanted to litigate Petitioner's claim in state court. It petitioned the bankruptcy court for leave to do so. The bankruptcy court granted such leave and

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[21] The bankruptcy judge commented that had the state court decided the issue erroneously, "[T]hat would clearly be *res judicata*." App. 1, at [p. 51].

in so doing ceded its concurrent jurisdiction to the state court. The state court rendered a final judgment adverse to Respondent, and Respondent eschewed the opportunity to have that judgment reviewed by this Court. Every litigant who suffers an adverse judgment would like another bite at the apple, and FED. R. CIV. P. 60(b) and BANKR. R. 9024 may provide that opportunity in some circumstances–but not in all circumstances. However meritorious Respondent's equitable-relief arguments may be, they cannot use Rule 9024 as a springboard to leap over the statutory mandate that the bankruptcy court accord full faith and credit to the state court judgment. In other words, Rule 9024 cannot be used to put the jurisdictional toothpaste back in the bankruptcy court tube.

FED. R. CIV. P. 60(b) and BANKR. R. 9024 are rules promulgated by this court pursuant to 28 U.S.C. § 2071, *et seq*. A final judgment creates a property right. *State of Louisiana, ex rel. Folsom v. Mayor and Adm'rs of the City of New Orleans*, 109 U.S. 285, 291 (1883). By 28 U.S.C. § 1738, Congress has mandated that federal courts give to state court judgments the same full faith and credit as the States must give to the judgments of their sister States. Petitioner submits, therefore, that the State court judgment is a "substantive right" for purposes of 28 U.S.C. § 2072(b), and thus cannot be abrogated pursuant to FED. R. CIV. P. 60(b) and BANKR. R. 9024. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (the line between "substance" and "procedure" shifts as legal context changes, and each term implies different variables, depending on the particular problem for which it is used.)

It is difficult to engage in the "substantive" versus "procedural" taxonomical analysis without indulging in tautologies. However, procedure would seem to concern itself with the means whereby an end result, a substantive

right, is realized. Congress has determined that among the rights embodied in a state court judgment is the right to full faith and credit. The federal courts may promulgate rules for determining the manner by which full faith and credit is given, but they may not, by rule, determine whether it is to be given or refused. For example, if a party wished to assert a state court judgment as *res judicata*, that party would have to plead the judgment affirmatively under FED. R. CIV. P. 8(c), else the claim is waived. In that situation, the court would not be denying full faith and credit, but it would be holding that procedurally, the relying party waived the right to full faith and credit.

In the present case, the holdings of the courts below bring BANKR. R. 9024 into direct conflict with the substantive right to full faith and credit created by 28 U.S.C. § 1738. In effect, the lower courts have held that they alone have the power to determine whether the state court judgment is entitled to full faith and credit.

The courts below tacitly treated the Rule 9024 motion as seeking relief from the prior orders of the bankruptcy court. That treatment ignores reality. The effect of Rule 9024 relief was to revise materially and substantively, the state court judgment. Once the state court judgment became final, the federal courts, by virtue of Section 1738 became powerless to revise it. *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). The only power retained by the bankruptcy court with respect to the judgment was to determine whether it was void for want of subject matter jurisdiction or was procured through fraud on the court that rendered it. *Pepper v. Litton*, 308 U.S. 295, 306 (1939). The bankruptcy court does not have the power to re-examine issues "determined by the judgment itself." *Heiser v. Woodruff, supra*, 327 U.S. at 736.

Federal bankruptcy law issues were raised and litigated at every stage of the state court proceedings. Even though raised, the state courts did not decide whether federal bankruptcy law prohibited recovery of attorney's fees and post-judgment interest. They did, however, render a final judgment for $2.2 million. The difference between the present case and *Pepper v. Litton* is that the state court in that case did not have subject matter jurisdiction to determine the trustee's equitable subordination claims. *Id.* at 303. In the present case, the state courts did have jurisdiction to determine the federal law claims, and by rendering judgment for attorney's fees and interest, did subsume and determine those claims. Because the Texas Court of Appeals mandate controls, that judgment, no matter how incorrect, is entitled to full faith and credit as a substantive right. Under the Rules Enabling Act, 28 U.S.C. § 2072, BANKR. R. 9024 cannot be used to take away that right.

CONCLUSION AND PRAYER

The Court of Appeals erred in upholding the Bankruptcy Judge's order. There was no jurisdictional basis for the bankruptcy court to relieve AFC of the unforeseen consequences of the 1993 Order.

Samaras prays this Court grant this Petition for Certiorari and upon due consideration, reverse the lower courts' judgments and reinstate Samaras' claim for interest and attorney's fees as embodied in the state court judgment.

/s/_____
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APPENDIX 1

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	) Case No. 91-12575-FM
	)
AL C0PELAND	) Austin, Texas
ENTERPRISES, INC.,	) August 26, 1997
	)
Debtor.	)

_____/

4421-1 Motion by Reorganized Debtor America's Favorite Chicken Company to Determine Claims of George Samaras for Post-Petition Attorneys' Fees, Interest and Costs, and Alternatively for Reconsideration of [4172-1] April 1993 Order

BEFORE THE HONORABLE FRANK R. MONROE
BANKRUPTCY JUDGE

APPEARANCES:

For America's Favorite Chicken,
Reorganized Debtor

MESSRS. JEFFREY S. LEVINGER and
TODD BARTON
Carrington, Coleman, Sloman &

Excerpts from Bankruptcy Judge's Oral Findings and Conclusions Pronounced on August 26, 1997

Blumenthal
200 Crescent Court, Suite 1500
Dallas, Texas 75201

For George Samaras
MR. BERNARD WM. FISCHMAN
Tinsman & Houser
700 N. St. Mary's St., 14th Floor
San Antonio, Texas 78205

[p. 2]

THE COURT: This is 91-12575, Al Copeland Enterprises. I'ts the reorganized debtor's motion to determine the amount of attorney's fees due on the claim of George Samaras. Who's here that wants to be heard today?

MR. LEVINGER: Jeff Levinger, your Honor, for AFC, and I have Mr. Todd Barton with me as well.

MR. FISCHMAN: Bernard Fischman for Mr. Samaras and Mr. McKenzie from my office is observing, Your Honor.

THE COURT: Okay. I'll let you proceed, Counsel.

[The argument of counsel, pp. 2 - 43, is omitted]

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* * *

THE COURT: Well, there is a certain sense of security in being the trial court when you have two lawyers as smart as you-all are and as well prepared as your are. And when the amount in controversy would suggest that there's going to be someone else to make the ultimate decision, it gives me a certain degree of comfort.

I suppose I could take this under advisement and spend a lot of hours, try to come up with some—analyze all the cases, pore over the facts and try to come up with some well-reasoned written opinion; however, I think I'll leave that to the ultimate authority, whether that be the district court or the circuit court, because I think this is a pretty good case. It's a pretty good issue and it's an important

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issue and there is a lot at stake. And there's not a lot of law that would be directly on point.

Mr. Levinger's arguments in a vacuum make perfect sense, as do Mr. Fischman's arguments. I think you could write an opinion from either side and people would say, "Well, that makes a great deal of sense." So all I'm going to try to do is set this up for whichever one of you wants to appeal it based on what I think is the right result.

The facts are that, for whatever reason, and we can all speculate on what the reason was, I thought it was kind of strange at the time, but Al Copeland Enterprises agreed to this

order of April the 7th, 1993, which said that the parties to this foregoing lawsuit that you-all have described that existed pre-petition wish to proceed with the liquidation of this claim in state court. In 1993 I was more than happy for people to go to state court. I had all I could say grace over. And I was very pleased that you-all were going to do that.

And it was clear, as reflected in my 1995 comments, that my view of this order is that the parties agreed that we're going to go liquidate this claim and that the liquidated amount or such judgment shall be classified as a Class 5 large trade claim and shall be deemed allowed under 5.02 of the plan, as approved by the Court's order confirming the plan. I mean that's pretty clear; it's hard to argue with.

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And I think that says -- it does two things, it seems to me. One, it abstains from considering it at the request of both litigants; and, two, it defines what's going to happen once they get a result, because the definition is:

> "The liquidated amount, if any, or such judgment shall be a large trade claim under Class 5 and shall be deemed allowed."

I mean, that's pretty clear. In and of itself, it makes you wonder, well, why go further? You know, what could possibly make you say that wasn't dispositive of the issue.

You-all argued, apparently, quite a bit before the State District Court, and it doesn't bother me that lawyers take a position in one court and a different position in this court,

they're there to represent their clients, as long as they're not being—as long as they're being truthful. They can shade the truth to their client's benefit it seems to me.

I appeared in front of Judge Ted Patton once in Houston right after my partner, Rey Stroube, appeared on another matter. He asked me if I thought it was appropriate for me to be arguing the exact opposite of my partner, and I told him I thought that's what lawyers did, especially partners. And this kinda is the same thing. And Mr. Fischman, as he points out here today, he says:

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> "All I said, you don't need to adjudicate those issues. There's nothing in the bankruptcy court order that requires you to do that. I think it would just be mistaken to do it at this point, we really don't know all the implication, what's in the plan. We can argue for days and ultimately, Judge Monroe will make that decision."

And, of course, here Mr. Fischman's. saying, "No, you don't have the right to make that decision." I think both arguments fall in the legitimate right of a lawyer to argue his case.

So, apparently that was—that was on March 3rd, 1995, and then there was an order or a judgment entered by the district court, Martha Tanner, and the bottom line was after reciting all of the jury answers to the special issues says that Mr. Samaras will recover from America's Favorite Chicken Company $1,522,586; attorneys' fees of

$685,163.75, as found by the jury in answer to Jury Questions 2a and 2b above, which is just 45 percent of those damages, basically, for a total judgment 2 million 2 and some change and interest at the rate of 10 percent from March 3rd, 1995 until paid in full.

So the state court liquidated the judgment -- liquidated the claim, there's no doubt about that. And then it wasn't too long after that, it was a couple of months after

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that, the America's Favorite Chicken Company comes back here and says basically, "You won't believe how they've treated me in state court, and please clarify your agreed order." Well, that's like an open invitation.

So I took that invitation and basically told you what I thought. And we heard that on September the 6th, 1995. And the issue there was posed by Mr. Levinger early on. He says, "I wondered"—I'll just start where he starts:

"You may be wondering why we're here now."

I assure you that that was my thought when he said that.

> "The answer, Your Honor, is that in reading the order which sent this case down to state court, I wondered if it contemplated such a procedure; that is, I wondered if it allowed us to come back to this court and litigate the allowability of items like post-petition attorneys' fees and so forth under the

> bankruptcy laws. I asked Mr. Fischman, who represents Mr. Samaras, about his views and he said he didn't think so. He said the order did not contemplate such a procedure. So, out of an abundance of caution, we preserved the issue in state court in the post-verdict stage, we raised

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> the bankruptcy issues before the state court and she I think probably wisely declined to rule on the bankruptcy issues and instead left them for this Court to decide," and blah, blah, blah on.

I imagine if we comb the record we'd find both parties arguing against each other on—against themselves at various times on various of the issues. I've noticed several as I thumb through the record. So I don't think anybody'd be bound or both of you'd have problems. Then I say:

> "Well, absent—in the normal case of an unsecured claim you don't get post-petition interest or attorneys' fees. And I think that's pretty clear."

Mr. Levinger says, "Yeah."

> "THE COURT: So the question then is, what?"

And the answer was: "What forum do we raise it in?"

And I added: "And whether or not you're precluded from raising it by the basis of the prior order."

And I won't go through the whole thing, but that was clearly what we were talking about back then. And, again, Mr. Fischman offers his sympathy to Mr. Levinger. I mean if it wasn't such a serious matter, you could clearly see a lot of

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humor in this situation.

So we get down to the end of that hearing and we talk about virtually everything in between. And it's really not too dissimilar of an argument that we've had here today. And I clearly stated that it was my opinion that the state court was to be a court acting not simply to apply state law but to apply bankruptcy law with regard to the liquidation of the claim. I guess I could've said something else, but that's what I said. And I said I came to that conclusion because I said the order doesn't make any sense otherwise.

We do, people go to state law a lot. There's always orders entered in this court saying go to state court. And generally it's situations where the parties want a jury to determine the issues. And generally they show up in two forms: one, liquidation of claims; or, two, dischargeability issues where I can make the determination of dischargeability as an exclusive jurisdictional grant and/or I can make the determination of the amount of the claim, which is concurrent jurisdictional grant. And so we do that a lot. But always in the

orders, those orders, it's go to state court, and we'll determine whether or not there's liability and come back and we'll determine if it's dischargeable.

This could have been a similar situation, go to state court, determine what the claim is and come back and we'll determine what amount of it is allowable in bankruptcy law.

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But my interpretation of the 1993 order in 1995 and also this point in time is that at the parties' request I abstained and said the state court should do everything. It should exercise my jurisdiction, the jurisdiction the bankruptcy courts have, and it should exercise its own jurisdiction, because it's clearly a court, in my opinion, of concurrent jurisdiction to do that. And 1334 makes that clear.

I've given original but not exclusive jurisdiction of all matters arising under Title 11 or in a case under Title 11. This was a matter arising in a case under Title 11, as well as arising under Title 11 because it was a claim objection, and it's clear that I have original but not exclusive jurisdiction.

Now, of course, my view of that and the state court's view are probably based upon, in large part on kind of I think their view -- start over. Their view that they don't have jurisdiction was probably based on why should we do their work for them, if I had to read between the lines, but that's what they said, the Court of Civil Appeals in San Antonio. 929 S.W.2d 617, they make it real clear, although I think *In Re: Wood* that they've cited for the proposition is an improper cite. It is a core proceeding, but bankruptcy court doesn't

retain exclusive jurisdiction under those claims. But the fact that I disagree with them doesn't mean squat because they decided what they decided.

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Now, this really is a question, no matter how you want to dance around it, that the debtor got themselves in a trap and now want out. The debtor did it to themselves. I don't know how big a factor that is. It seems to me that if the state court had said, "Yes, we agree, we are going to exercise the bankruptcy court's jurisdiction and we find that post-petition interest and attorneys' fees are allowable," and the state court had upheld that on appeal, that would clearly be res judicata and there would be no basis upon which anyone could ask me to change that. The issue, it seems to me, is whether or not that result should stay the same or it should be different based upon the fact that the state court said, "We don't want that jurisdiction and we don't pretend to exercise it, nor do we pretend to make any determination, by bankruptcy law, allowability of this claim."

This would seem to fall within four squares the *Silverman* situation where you had the three-judge constitutional court voted to abstain from, deciding a constitutional question so that the State Supreme Court could be first afforded an opportunity to determine the proper construction of its own amended, newly amended rule. Then when it didn't, litigant came back to the -- didn't consider the federal question about the constitutional law -- came back to the federal court and the federal court said, "Well, in

Excerpts from Bankruptcy Judge's Oral Findings and Conclusions Pronounced on August 26, 1997

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light of the state court's action in not passing upon the constitutional issues, the plaintiff is not foreclosed from returning to this court for presentation of the federal issues for final review. And such procedure does not contravene the provisions of 28 USC 1257 in a federal abstention." So you get to that point and you say, "Well, why isn't Al Copeland clearly the winner in this, the debtor, or its successor?" So then you go back and you look at that order of April 7th, 1993, and it says what? It says we've currently got a lawsuit in state court who wish to proceed with the liquidation of this claim in state court and:

> "The liquidated amount, if any, or such judgment shall be classified as a Class 5 large trade claim and shall be deemed allowed."

And we've got a liquidated judgment. It just includes matters which would otherwise be non-allowable under federal bankruptcy law: post-petition interest and attorneys' fees. Clearly, Al Copeland Enterprises was insolvent at all times during the proceeding, the disclosure statement makes that perfectly clear. There were massive amounts of conversion of debt to equity in order to make the debtor, as reorganized, work because it had way too much debt to service, and the creditors weren't paid in full. So there's no overage out of which post-petition interest or attorneys' fees could be paid.

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The question is how do you merge this order with *Silverman v. Browning*? Because I didn't reserve anything in

this order and this is just my gut feel, it's worth something until Judge Sparks or Judge Nowlin or some Fifth Circuit panel says it's not any good. I think the only way to read this is to read this order to say that in the context of a federal abstention doctrine that I did my best to stay out of this. I wanted to stay out of it; the parties wanted me to stay out of it, and I was happy to accommodate them.

The Court of Civil Appeals and the Supreme Court and the District Court and the State Court played hot potato with the issue and didn't decide it. And I think under the circumstances that I'm required to decide the issue, and that America's Favorite Chicken Company is not precluded from coming back here on the federal law issues of the allowability of the post-petition interest and the post-petition attorneys' fees. And applying bankruptcy law to those issues, I have to disallow those amounts for the reasons I stated earlier.

So that's my ruling. If I've got an order here that will be sufficient I'll sign it and get the ten days running; I'm not sure that I do.

MR. LEVINGER: I didn't send in an order, Your Honor. I'll prepare one and run it by Mr. Fischman, with the Court's permission.

THE COURT: Okay. If you would do that, just note

[page 54]

that I made my findings of fact and conclusions of law under Bankruptcy Rules 9014 and 7052 orally on the record, and

that I found that this was a core proceeding under 28 USC 157(b) (2) (B) and that therefore I have the jurisdiction to enter a final order under 28 USC 150—excuse me, 1334(a) and (b), 28 USC 157 (a) and (b) (1) and 28 USC 151 and the standing order of reference from the district court in this district, and that those oral findings and conclusions are incorporated by reference, then you won't have to try to repeat them in any orders. And hopefully you-all will get a resolution that's more authoritative higher up. And we'll be adjourned.

(End of proceedings 3:00 p.m.)

I certify that the foregoing is a correct transcript of the electronic sound recording of the proceedings in the above-entitled matter.

/s/_____ 9/25/97
RUTH ANN HAUSMAN Date
2900 Norfolk Dr.
Austin, Texas 78745
(512) 892-2768

APPENDIX 2

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§ Case No. 91-12575-FM
	§
AL C0PELAND	§ Chapter 11
ENTERPRISES, INC.,	§ [FILED Sep 08, 1997
	§ U.S. Bankruptcy Court
Debtor.	§ By /s/_____ Deputy]

ORDER DISALLOWING CLAIMS OF GEORGE SAMARAS FOR POST-PETITION ATTORNEY'S FEES, INTEREST AND COSTS

On August 26, 1997, the Court conducted a hearing on AFC Enterprises, Inc.'s Motion to Determine Claims of George Samaras for Post-Petition Attorney's Fees, Interest, and Costs, and Alternatively, for Reconsideration, or Relief From April 1993 Order, and Brief in Support ("AFC's Motion"). The Court read and considered AFC's Motion, the Appendix to AFC's Motion, the Reply of George Samaras to AFC's Motion, and AFC's Reply Brief, and heard the arguments of counsel. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). Therefore, the Court has jurisdiction to enter a final order pursuant to 28 U.S.C. § 1334(a) and (b), 28 U.S.C. § 157(a) and (b)(1), 28 U.S.C. § 151, and the standing Order of Reference from the district court in this district. Pursuant to Federal Rules of Bankruptcy Procedure

9014 and 7052, the Court orally made findings of fact and conclusions of law on the record, which oral findings and conclusions are hereby incorporated by reference as if fully set forth herein. Based thereon, the Court determines that AFC's Motion should be granted. It is, therefore,

ORDERED that the claims of George Samaras for post-petition attorney's fees, interest, and costs shall be, and the same are hereby, disallowed.

9/8/97 /s/_____
F. R. Monroe

4428

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-97-CA-846 JN

[FILED JAN 15 1998 U.S. Clerk's Office
By /s/ MLC
Deputy]

IN RE:	§
AL COPELAND ENTERPRISES, INC.	§
	§
GEORGE SAMARAS	§
	§
VS.	§
	§
AMERICA'S FAVORITE CHICKEN CO.	§

ORDER

Before the Court is an appeal from a final order of the Bankruptcy Court. Appellant filed his Brief on December 3, 1997, and Appellee filed its Brief on December 22nd. Although the rules allow the Appellant to file a brief in reply to the Appellee's brief, Appellant did not file a reply brief. *See* FED. BANKR. R. 8009(3). After conducting a *de novo* review of the Bankruptcy Court's orders and the entire file in

this cause, this Court finds that the decisions of the Bankruptcy Judge being appealed should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Bankruptcy Court's orders made a part of this appeal are hereby AFFIRMED.

IT IS FURTHER ORDERED that this cause is CLOSED and that any pending motions are hereby DISMISSED AS MOOT.

SIGNED AND ENTERED this 14th day of January, 1998.

/s/_____
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Order and Final Judgment of the District Court, filed January 14, 1998, Affirming Bankruptcy Court's Order

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-97-CA-846 JN

[FILED JAN 15 1998 U.S. Clerk's Office
By /s/ MLC
Deputy]

IN RE:	§
AL COPELAND ENTERPRISES, INC.	§
	§
GEORGE SAMARAS	§
	§
vs.	§
	§
AMERICA'S FAVORITE CHICKEN CO.	§

FINAL JUDGMENT

Before the Court is an appeal from a final order of the Bankruptcy Court. For the reasons set forth in the Court's Order entered on this date, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED, ADJUDGED AND DECREED that the Bankruptcy Court's orders made a part of this appeal are hereby AFFIRMED.

Order and Final Judgment of the District Court, filed January 14, 1998, Affirming Bankruptcy Court's Order

SIGNED AND ENTERED this 14th day of January, 1998.

/s/_____
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appeal from the United States District Court
for the Western District of Texas

No. 98-50147
(Summary Calendar)

[U.S. Court of Appeals
FILED
September 16, 1998
Charles R. Fulbruge, III Clerk]

In The Matter Of:
AL COPELAND ENTERPRISES INCORPORATED
Debtor

GEORGE SAMARAS
Appellant,

v.

AMERICAS FAVORITE CHICKEN
COMPANY INCORPORATED
Appellee.

§
§
§
§
§
§
§
§
§

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

WIENER, Circuit Judge:

Appellant George Samaras ("Samaras") appeals the bankruptcy court's order—affirmed by the district court—disallowing under the Chapter 11 reorganization plan of Appellee America's Favorite Chicken Company, Inc. ("AFC"), Samaras's claim for attorney's fees, costs, and interest awarded in a state lawsuit. Concluding that the bankruptcy court's holding is correct, we affirm.

I.
FACTS AND PROCEEDINGS

In 1990, Samaras sued Al Copeland Enterprises, Inc. ("ACE") in Texas state court for breach of contract. ACE subsequently filed for protection under Chapter 11 of the United States Bankruptcy Code, and Samaras filed a proof of claim in the bankruptcy proceeding. The bankruptcy court approved a reorganization plan for the debtor ACE. As part of the reorganization, AFC was incorporated as a separate, on-going enterprise. The parties then agreed to return the case to state court to liquidate Samaras's contract claim substituting AFC as the defendant. In 1993, the bankruptcy court entered an order ("1993 Order") permitting them to do so. The 1993 Order provided that "upon the exhaustion of any appeals or writs of certiorari or in the event of settlement, the liquidated amount, if any, or [sic] such judgment . . . shall be deemed allowed" under ACE's reorganization plan and "shall be paid in accordance with" the plan's provisions.

Samaras prevailed on his contract claim in state court. In addition to actual damages of $1,522,586, Samaras was awarded $686,178.70 in attorney's fees and costs. Under

Texas law, the entire judgment is subject to interest of 10% per annum.[1] Although AFC argued that the award of attorney's fees, costs, and interest was not allowable under bankruptcy law, the Texas trial court refused to consider the issue, holding that it had no jurisdiction to decide the question of federal law. AFC then returned to the bankruptcy court seeking clarification of that court's order, specifically whether the bankruptcy court intended the state court to decide such subsidiary questions of federal law. In 1995, the bankruptcy court entered an order ("1995 Order clarifying that it had intended just that.

Thus armed, AFC argued to the Texas appellate court that the lower court incorrectly refused to consider the allowability of the attorney's fees, costs, and interest under federal law. Following the trial court's lead, however, the appellate court too refused to address the bankruptcy law question, and simply affirmed the award. The Texas Supreme Court denied AFC's application for a writ of error. Thus rebuffed again, AFC returned to the bankruptcy court for a third time, filing a motion to disallow the contested aspects of the award, as (1) they were clearly not recoverable under federal law, and (2) the Texas courts had incorrectly refused to consider the issue. In September, 1997, the bankruptcy court granted AFC's motion ("1997 Order"), and Samaras timely filed a notice of appeal.

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[1] Tex.Rev.Civ. Stat. Ann. art. 5069-1.05 (West Supp.1997)

II.
ANALYSIS

A. *Standard of Review*

The issues presented in this appeal are questions of law, which we review de novo.[2]

B. *Applicable Law*

The bankruptcy court did not explicitly state the basis for the 1997 Order that disallowed the contested aspects of Samaras's claims. Samaras characterizes the 1993 Order as an abstention order and argues that the bankruptcy court, having turned over to the state court all aspects of Samaras's claim in that abstention order, lacked jurisdiction to enter the 1997 Order. Samaras further contends that, even assuming that the bankruptcy court had jurisdiction to enter the 1997 Order, AFC waived its right to have the federal court determine the bankruptcy issue when AFC freely agreed to remove all aspects of the parties' dispute to the state court system. Finally, again assuming jurisdiction, Samaras asserts that, as the 1993 Order was a final order, the bankruptcy court abused its discretion when it granted AFC relief under Federal Rule of Civil Procedure 60(b).[3] AFC, like Samaras, frames its

---

[2] *LSP Investment Partnership v. Bennett (In re Bennett)*, 989 F.2d 779, 781 (5th Cir. 1993).

[3] Samaras does not argue that bankruptcy law permits him to recover the contested attorney's fees, costs, and interest; neither does he argue that the Texas courts lacked jurisdiction to consider

arguments in terms of abstention and Rule 60(b), albeit that AFC disagrees with Samaras's contentions on all counts.

1. *Jurisdiction*

A bankruptcy court may "in the interest of justice, or in the interest of comity with State courts or respect for State law" abstain from hearing a Title 11 controversy. [4] Samaras argues that once a federal court enters an abstention order relinquishing jurisdiction over a case, the abstaining court cannot reclaim the case unless it has explicitly retained jurisdiction in the abstention order. We need not assess the merit of Samaras's position because in the 1993 Order the bankruptcy court did reserve jurisdiction over the Samaras's claim. The order provided that, once liquidated, Samaras's claim would be deemed allowed under AFC's reorganization plan and would be paid accordingly.

The bankruptcy court indisputably had jurisdiction over the administration of the reorganization plan, including the processing of Samaras's liquidated claim thereunder. Although Samaras is likely correct when he notes that the bankruptcy court did not envision having to do anything more than "plugging" the claim back into the reorganization plan, the court's expectations cannot somehow void the jurisdiction it retained over the matter in the 1993 Order.

---

the federal issue.

[4] 28 U.S.C. § 1334(c)(1) (1994).

2. *Waiver*

Samaras's second contention—that by consenting to the 1993 Order permitting the parties to return to state court, AFC waived its right to have the allowability of the fees, costs, and interest determined by a federal court—is somewhat more meritorious. Samaras rests his argument primarily on *England v. Louisiana State Board of Medical Examiners*.[5] In *England*, the Supreme Court addressed whether a party may, within the context of abstention, waive his right to return to federal court for final determination of his claim. Relying on its earlier decision in *NAACP v. Button*,[6] the Court held that "if a party freely and without reservation submits his claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court."[7] The Court made clear, however, that a party cannot be denied his right to return to federal court unless he "fully litigated" his claims in state court.[8]

Not surprisingly, Samaras contends that AFC voluntarily submitted to the jurisdiction of the state courts of

---

[5] 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

[6] 371 U.S. 415, 427-428, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[7] *England*, 375 U.S. at 419, 84 S.Ct. 461.

[8] *Id.* at 421-22, 84 S.Ct. 461.

Texas, and that, as both parties briefed and argued their positions at every stage of the litigation, the federal question at issue was "fully litigated." AFC responds that the federal question manifestly was not "fully litigated" because the Texas courts—trial appellate, and Supreme-refused to consider the issue at all. In *Front Royal Industrial Park Corporation v. Town of Front Royal Virginia*,[9] a case not cited by either party, the Fourth Circuit addressed this exact issue. There, as here, the state courts refused to consider the federal claim presented. The *Front Royal* court held that the plaintiff's federal claims had not been fully litigated as required by *England*, stating "[w]e can see no warrant for finding voluntary waiver of *England*-type rights where ... the state court expressly refuses to reach the federal claims presented to it out of concerns for comity."[10] We agree with this reasoning.

Federal courts take very seriously the strict duty to exercise jurisdiction conferred on them, relinquishing that

---

[9] 135 F.3d 275 (4th Cir. 1998).

[10] *Id.* at 284 n. 4; *see also Ivy Club v. Edwards*, 943 F.2d 270, 281 (3d Cir.1991) (considering fact that state courts had not decided federal claims in determining that plaintiff had not made *England* waiver), *cert. denied Del Tufo v. Ivy Club*, 503 U.S. 914, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992); *Silverman v. Browning*, 414 F.Supp. 80, 85 (D.Conn.) (holding plaintiff had not waived its right to return to federal court after entry of abstention order because state courts had refused to consider federal claims on procedural grounds), *aff'd* 429 U.S. 876, 97 S.Ct. 228, 50 L.Ed.2d 162 (1976).

jurisdiction only under specified circumstances.[11] Accordingly, abstention is viewed as an extraordinary measure—"the exception, not the rule."[12] Although, as *England* instructs, a party may voluntarily waive his right to avail himself of the federal court system, such a waiver is no light matter. The Supreme Court has specified strict limitations on this kind of waiver, including the requirement that the federal claim be fully litigated and decided by the state court. More generally, waiver is defined as "the intentional relinquishment or abandonment of a known right."[13]

In no way can AFC be said to have intentionally relinquished or abandoned its right to have its federal claim heard in federal court. In short, we, like the Fourth Circuit, see no merit in the proposition that a litigant can be deprived of his access to federal court simply because the state courts, through no fault of that litigant, refuse to entertain and dispose of the federal claims presented. When, following a federal court's entry of an abstention order, the cognizant state courts expressly refuse to consider the federal issues in

---

[11] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (Federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given to them.").

[12] *Id.* at 813, 96 S.Ct. 1236.

[13] *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1420 (5th Cir.1996) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

the case, those issues have neither been fully litigated nor decided. We hold that, under such circumstances, the litigant has not waived his right to return to federal court.

3. *Rule 60(b)*

Thus, Samaras is left with only his Rule 60(b)(6) argument. We review a trial court's grant of a Rule 60(b) motion for abuse of discretion.[14] Under Rule 60(b)(6), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 9024,[15] a court has the authority to relieve a party from a final order for any "reason justifying relief from the operation of the judgment."[16] In *Seven Elves, Incorporated v. Eskenazi*,[17] we set forth several factors relevant to considering a motion under Rule 60(b)(6), including (1) whether the motion was made within a reasonable time, (2) whether the movant had a fair opportunity to present his claim or defense, and (3) whether granting relief would be equitable.[18] Here, each of these factors weighs heavily in favor of sustaining the bankruptcy court's grant of AFC's Rule 60(b)(6) motion. AFC first pursued relief in state court all the way from the trial court to the Texas Supreme Court, and then made its

---

[14] *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990).

[15] Fed. R. Bankr. P. 9024.

[16] Fed. R.Civ. P. 60(b)(6).

[17] 635 F.2d 396 (5th Cir.1981).

[18] *Id.* at 402.

Rule 60(b)(6) motion only after relief in state court was no longer available. AFC could not have anticipated that the Texas state courts would refuse to hear its claim. In fact, when AFC was first alerted to such a possibility, it returned to the bankruptcy court to have the matter clarified. Under these circumstances, AFC's Rule 60(b)(6) motion was timely and providently made. Moreover, as the foregoing discussion regarding waiver indicates, because the state courts refused to hear its arguments, AFC did not have a fair opportunity to present them to the state courts. For the same reason, we conclude that to deny AFC a federal determination of the allowability of the fees. costs, and interest portion of Samaras's claim would be inequitable. As such, the bankruptcy court did not abuse its discretion when it granted AFC's Rule 60(b)(6) motion.

III.
CONCLUSION

The bankruptcy court did not lack the jurisdiction to disallow the contested portion Samaras's claim, given that court's indisputable retention of jurisdiction over the administration of AFC's reorganization plan. Moreover, AFC did not waive its right to have the bankruptcy court make that determination because through no fault of AFC, the federal issue was not fully litigated in the courts of Texas. Finally, the bankruptcy court did not abuse its discretion in granting AFC's Rule 60(b)(6) motion, as the refusal of the Texas courts to consider the federal issue provided the bankruptcy court with ample justification for revisiting Samaras's claim. Accordingly, the ruling of the bankruptcy court, affirmed by the district court, is in all respects,

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court
for the Western District of Texas

No. 98-50147
(Summary Calendar)

[U.S. Court of Appeals
FILED
October 15, 1998
Charles R. Fulbruge, III Clerk]

In The Matter Of:
AL COPELAND ENTERPRISES INCORPORATED
Debtor

GEORGE SAMARAS
Appellant,

v.

AMERICAS FAVORITE CHICKEN
COMPANY INCORPORATED
Appellee.

§
§
§
§
§
§
§
§
§

ON PETITION FOR REHEARING

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
Jacques L. Weiner, Jr.

REHG-2

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX 5

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
October 22, 1992
Charles W. Vagner, Clerk
By /s/_____ Deputy

In re:	§	Chapter 11
	§	
AL COPELAND	§	Case No. 91-15275-FM-11
ENTERPRISES, INC.	§	
Debtor.	§	

[Page 1]

ORDER CONFIRMING FOURTH AMENDED PLAN OF REORGANIZATION, AS MODIFIED, PROPOSED BY CANADIAN IMPERIAL BANK OF COMMERCE, AS AGENT, AND FIXING BAR DATES FOR FILING ADMINISTRATIVE EXPENSE CLAIMS AND CLAIMS ARISING FROM THE REJECTION OF EXECUTORY CONTRACTS

This matter came before the Court for hearing (the "Confirmation Hearing") on July 27, 1992, on the Fourth Amended Plan of Reorganization proposed by Canadian Imperial Bank of Commerce, as Agent ("CIBC"), with respect to Al Copeland Enterprises, Inc. (the "Debtor") dated

July 27, 1992 (the "Fourth Amended Plan"), as modified with respect to Sections 5.05, 6.07 (a), 7.01, and 7.02 thereof (the "Modifications", and the Fourth Amended Plan as modified by the Modifications being hereinafter referred to as the "Plan").[1] The Joint Disclosure Statement, approved by the Court on May 5, 1992, and the Third Amended Plan of Reorganization proposed by CIBC with respect to the Debtor dated May 1, 1992 (the "Third Amended Plan"), along with other materials directed by the Court, having been

[page 2]

transmitted to the Debtors creditors and equity security holders, the Office of the United States Trustee, the Securities and Exchange Commission, the Internal Revenue Service and all other parties-in-interest who have requested notice; and the Court having considered the evidence and testimony presented at the Confirmation Hearing, the arguments of counsel, the Joint Disclosure Statement and the Exhibits thereto, the Plan, and the objections filed with respect to the Plan; and the Court having entered findings of fact, conclusions of law, and rulings on the record an October 20, 1992; and good and sufficient cause appearing therefor; it is hereby

ORDERED, DECREED, AND ADJUDGED THAT:

1. Any and all objections to confirmation of the Plan not previously withdrawn be, and the same hereby are, overruled, and all findings of fact, conclusions of law, and

---

[1] Capitalized terms used but not defined in this Order shall have the meanings ascribed to such terms in the Plan.

rulings entered an the record on October 20, 1992 be, and the same hereby are, incorporated in this Order by reference and made a part hereof.

2. The Plan, in the form of the Restated Fourth Amended Plan incorporating the Modifications and annexed hereto as Attachment 1, be, and the same hereby is, approved and confirmed.

[Pages 3 - 23 omitted]

[page 24]

42. The Court shall retain jurisdiction over the Reorganization Case to the extent provided in Section 9.04 of the plan (including, without limitation, jurisdiction over that certain adversary proceeding entitled *Alvin C. Copeland v. Merrill Lynch & Co., Inc. et al.*, Adversary Proceeding No. 92-1186-FM)

Signed this 22 day of October, 1992.

/s/ _____
Frank R. Monroe
UNITED STATES BANKRUPTCY JUDGE

AGREED TO AND ENTRY REQUESTED:

OPPENHEIMER, ROSENBERG &
KELLEHER, INC.
711 Navarro, Sixth Floor
San Antonio, Texas 78205
(512) 224-2000

By: /s/_____
John H. Tate, II
State Bar No. 19666500
RAYMOND W. BATTAGLIA
State Bar No. 01918055
TIMOTHY N. TUGGEY
State Bar No. 29282900

ATTORNEYS FOR CANADIAN
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as AGENT

Of Counsel:

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[page 25 omitted]

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

[Page 26]

ATTACHMENTS TO CONFIRMATION ORDER

Attachment I	Restated Fourth Amended Plan
Attachment II	Notice of order to Filing and Recording Officers
Attachment III	Transition Procedures
Attachment IV	Letters to Employees and Franchisees
Attachment V	Notice of Confirmation

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ATTACHMENT I

In re:	§	Chapter 11
	§	
AL COPELAND	§	Case No. 91-15275-FM-11
ENTERPRISES, INC.	§	
Debtor.	§	

RESTATED FOURTH AMENDED PLAN OF REORGANIZATION
PROPOSED BY CANADIAN IMPERIAL BANK OF COMMERCE as AGENT

October 20, 1992

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[i]

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

In re:	§	Chapter 11
	§	
AL COPELAND	§	Case No. 91-15275-FM-11
ENTERPRISES, INC.	§	
Debtor.	§	

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

RESTATED FOURTH AMENDED PLAN OF REORGANIZATION PROPOSED BY CANADIAN IMPERIAL BANK OF COMMERCE as AGENT

Canadian Imperial Bank of Commerce, as Agent for the Acquisition Banks (as hereinafter defined), hereby proposes the following plan of reorganization pursuant to the provisions of Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 et seq.

ARTICLE I
DEFINITIONS

Section 1.01 Definitions. Unless the context otherwise requires, the following terms shall have the following meanings when used in initially capitalized form in this Plan. Such meanings shall be equally applicable to both the singular and plural forms of such terms. The words "herein," "hereof" and "hereunder" and other words of similar import refer to this Plan as a whole and not to any particular section, subsection, or clause contained in this Plan unless the context requires otherwise. Whenever from the context it appears appropriate, each term stated in either the singular or the plural includes the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender include the masculine, feminine and the neuter. Any term used in initially capitalized form in this Plan that is not defined herein but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to such term in the Bankruptcy Code or the Bankruptcy Rules. Definitions set forth below for agreements or documents that are referred to in this Plan are

for descriptive purposes only, and shall not be deemed to limit or otherwise affect the substantive provisions of any such agreement or document.

"Acquisition Bank Claim" shall mean a Claim of CIBC or the Acquisition Banks against the Debtor for payment or performance of the Acquisition Debt or of any obligation under an Acquisition Letter of Credit.

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"Acquisition Banks" shall mean, collectively, CIBC, Inc., Eaton Vance Prime Rate Reserves, Pilgrim Prime Rate Trust, Van Kampen Merritt Prime Rate Income Trust, Fidelity Bankers Life Insurance Company, and First Capital Life Insurance Company, and their legal successors and assigns.

"Acquisition Credit Agreement" shall mean that certain Amended and Restated Merger Loan Agreement dated as of September 21, 1989, as amended or supplemented, among the Company, as borrower, CIBC, as Agent, and the Acquisition Banks, as lenders, and all ancillary instruments, agreements, and documents evidencing or securing the indebtedness incurred, or otherwise covered by, the Acquisition Credit Agreement.

"Acquisition Debt" shall mean all indebtedness and obligations of the Debtor under the Acquisition Credit Agreement, including, without limitation, all liabilities on account of interest rate swaps and all Reimbursement obligations under Acquisition Letters of Credit, whenever arising.

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

"Acquisition Letter of Credit" shall mean a letter of credit issued by CIBC or an Acquisition Bank pursuant to the terms of the Acquisition Credit Agreement.

"Administrative Claim" shall mean a Claim, other than a cure Claim, to the extent that it is of the kind described in Section 503 (b) of the Bankruptcy Code and is entitled to priority under Section 507 (a) (1) of the Bankruptcy Code.

"Affiliate" shall mean (a) with respect to the Company or the Debtor (as the case may be), any corporation, partnership or other entity, excluding natural persons, which, directly or indirectly, controls, is controlled by, or is under common control with the Company or the Debtor (as the case may be) (b) with respect to any entity other than the Company, the Debtor, a governmental unit or a natural person, any corporation, partnership, association or other entity which, directly or indirectly, controls, is controlled by or is under common control with such entity; or (c) with respect to Copeland, the parties to the Copeland Consent. For purposes of this definition, the term "control" means the ownership or effective control of more than 20 percent of the beneficial or voting interest in the corporation or other entity referred to.

"Allowed" shall mean (a) with respect to an Administrative Claim of the kind described in Section 503 (b) (2), (3), (4), (5) or (6) of the Bankruptcy Code, an Administrative Claim that has been allowed by a Final Order; (b) with respect to any other Administrative Claim, an Administrative Claim to which no objection has been filed; (c) with respect to a Cure Claim, a Cure Claim that has been allowed by a Final Order, or by settlement; or (d) with

respect to any Claim that is not a Superpriority claim, an Administrative Claim, or a cure claim, a

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Claim that is not a Disputed Claim or has been allowed, by a Final order, to the extent so allowed.

"Articles of Incorporation" shall mean the articles of incorporation to be adopted by the New Company pursuant to Section 6.01 of the Plan, the form of which shall be filed with the Bankruptcy Court no later than the Confirmation Hearing Date.

"Assumed Insider Contract" shall mean an Insider Contract designated to be assumed in the Schedule of Insider Contract Assumptions and Rejections.

"Ballot Deadline" shall mean that date set in an order of the Bankruptcy Court, with extensions (if any), as the deadline for the return of ballots accepting or rejecting the Plan.

"Bankruptcy Code" shall mean title 11 of the United States Code, as in effect on the date of the Plan or as thereafter amended, but only to the extent that any such amendment purports to become effective for the Reorganization Case on or before the Confirmation Date.

"Bankruptcy Court" shall mean the bankruptcy court unit of the United States District Court for the Western District of Texas, Austin Division, or in the event and to the extent that such unit ceases to exercise subject matter

jurisdiction over the Reorganization Case (whether by abstention, withdrawal of reference, change of venue or otherwise), such court, or unit or adjunct thereof, that exercises subject matter jurisdiction over the Reorganization Case in lieu of such unit.

"Bankruptcy Rules" shall mean the Federal Rules of Bankruptcy Procedure as in effect on the date of the Plan or as thereafter amended, but only to the extent that any such amendment purports to become effective for the Reorganization Case on or before the Confirmation Date.

"Bridge Loan Agreement" shall mean that certain Financing Agreement dated as of March 21, 1989, as amended or supplemented, between the Company, as borrower, and Merrill Lynch, as lender, and all ancillary instruments, agreements, and documents evidencing the indebtedness incurred, or otherwise covered by, the Bridge Loan Agreement.

"Business Day" shall mean any day other than a Saturday, Sunday, or day on which commercial banks in New York City are authorized or required to close.

"CIBC" shall mean Canadian Imperial Bank of Commerce, a Canadian chartered bank acting through its New York agency.

"Claim" shall mean a claim against the Debtor within the meaning of Section 101(5) of the Bankruptcy Code, as supplemented by Section 102(2) of the Bankruptcy Code.

"Class" shall mean an indicated class of Claims defined in Article III of the Plan.

"Class __ claim" shall mean a Claim that is designated to be included in the indicated class of Claims defined in Article III of the Plan.

"Class 3B Percentage" shall mean, for CIBC and each Acquisition Bank, that percentage of the following sum outstanding on the Effective Date held by it, or for which it is liable or committed, on the Effective Date: (a) Acquisition Debt, plus (b) DiP Debt, plus (c) the aggregate amount available for draw under Acquisition Letters of Credit, plus (d) the New Term Loan Amount set forth in the New Credit Agreement, plus (a) the Revolving Credit Commitment set forth in the New Credit Agreement.

"Common Shareholders Agreement" shall mean an agreement among the holders of the New Common Stock, the form of which shall be filed with the Bankruptcy Court no later than the Confirmation Hearing Date.

"Common Stock Claim" shall mean any Claim with respect to the Old Common Stock of the kind described in Section 510 (b) of the Bankruptcy Code.

"Company" shall mean, collectively, Al Copeland Enterprises, Inc., a Texas corporation, and its predecessors in interest.

"Compensatory Cure Claim" shall mean a Cure Claim to the extent that it is for the actual pecuniary loss associated with a breach or default the cure of or compensation for

which is required for the assumption of an executory contract or unexpired lease pursuant to Section 365 (b) (1) of the Bankruptcy Code.

"Confirmation" shall mean entry of the Confirmation Order.

"Confirmation Date" shall mean the date upon which the Bankruptcy Court enters the Confirmation Order.

"Confirmation Hearing Date" shall mean the date upon which the hearing with respect to the Plan required by Section 1128 (a) of the Bankruptcy Code commences.

"Confirmation Order" shall mean the order entered by the Bankruptcy Court confirming the Plan pursuant to Section 1129 of the Bankruptcy Code.

"Contractual Subordination" shall mean the subordination of the Merrill Lynch Claims to the Acquisition Bank Claims effected by the Bridge Loan Agreement.

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"Copeland" shall mean Alvin C. Copeland, a Louisiana resident and sole holder of the Old Common Stock.

"Copeland Consent" shall mean a form of Consent and Agreement, including annexes thereto, in the form annexed to the Plan as Exhibit A, with such changes as the Proponents may agree to.

"Copeland Proceedings" shall mean, collectively, all

civil actions, adversary proceedings, contested matters, and other proceedings heretofore or hereafter brought against any one or more of the parties to the Copeland Consent by or on behalf of the Debtor or the Estate in any court or other tribunal, whether or not persons other than such parties are joined as defendants therein.

"Cure Claim" shall mean any Claim arising at any time under or relating to any executory contract or unexpired lease to which the Debtor was a party on April 12, 1991 and which has been or will be assumed under Section 365(a) of the Bankruptcy Code or pursuant to the Plan (a "Contract"), including, without limitation, (a) any claim of breach of or default under a Contract, (b) any claim for actual pecuniary loss resulting from such a breach or default, (c) any statutory or common law claim arising out of the relationship evidenced by a Contract, including, without limitation, antitrust, unfair trade practices, unfair competition, breach of fiduciary duty, breach of a duty or implied covenant of good faith or fair dealing, tortious interference with the obligations of contract, fraud, intentional or negligent misrepresentation, violation of federal or state laws governing franchising or franchise relationships, and any other claim or cause of action arising in contract, tort, breach of statute, breach of duty, or on any civil law basis, and (d) multiple, exemplary, or punitive damages or any claim for equitable relief relating to any of the foregoing.

"Debtor" shall mean the Company as debtor and as debtor-in-possession under Sections 1107 and 1108 of the Bankruptcy Code and, with respect to actions undertaken an or subsequent to the Effective Date, the New Company.

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

"DiP Banks" shall mean, collectively, CIBC, Inc., Eaton Vance Prime Rate Reserves, and Van Kampen Merritt Prime Rate Income Trust, and their legal successors and assigns.

"DiP Credit Agreement" shall mean that certain Amended and Restated Secured Credit Agreement dated as of July 31, 1991, as amended or supplemented, among the Debtor, as borrower, CIBC, as Agent, and the DiP Banks, as lenders, and all ancillary instruments, agreements, and documents evidencing or securing the indebtedness incurred, or otherwise covered by, the DiP Credit Agreement.

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"DiP Debt" shall mean all indebtedness and obligations of the Debtor under the DiP Credit Agreement, including, without limitation, all Reimbursement Obligations under DiP Letters of Credit whenever arising.

"DiP Letter of Credit" shall mean a letter of credit issued by CIBC or a DiP Bank pursuant to the terms of the DiP Credit Agreement.

"Disclosure Statement" shall mean the disclosure statement for the Plan approved by the Bankruptcy Court pursuant to Section 1125 of the Bankruptcy Code, together with any exhibits thereto and any documents incorporated therein by reference, as the same may be amended, modified or supplemented from time to time in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Rules.

"Disclosure Statement Hearing" shall mean the hearing before the Bankruptcy Court on approval of the Disclosure Statement.

"Disputed Claim" shall mean a Claim, other than a Superpriority claim, an Administrative Claim, or a Cure Claim, that (a) would be deemed filed pursuant to Section 1111(a) of the Bankruptcy Code but as to which (i) a proof of claim has been filed that is inconsistent in any way with the description or treatment of such Claim in the schedules filed by the Debtor pursuant to Section 521(l) of the Bankruptcy Code, or (ii) an objection has been filed on or before the Effective Date, or (b) would not be deemed filed pursuant to Section 1111(a) of the Bankruptcy Code, whether by reason of its exclusion from such schedules or its description therein as disputed, contingent, or unliquidated, but as to which (i) no proof of claim has been filed, or (ii) a proof of claim has been filed, to which an objection has been filed on or before the Effective Date; provided, however, that in the event that the Bankruptcy Court or the Plan permits, or the Bankruptcy Code requires, a Claim to be liquidated or allowed in a forum other than the Bankruptcy Court, then such Claim shall be a Disputed Claim until liquidated or allowed by a Final Order or by agreement of the parties.

"Diversified" shall mean Diversified Foods and Seasonings, Inc. (f/k/a New Orleans Spice Company, Inc.), a Louisiana corporation.

"Effective Date" shall mean the date ten (10) Business Days after all conditions to consummation set forth in Section 8.02 of the Plan shall have been satisfied.

"Estate" shall mean the estate created in the Reorganization Case by Section 541 of the Bankruptcy Code.

"Executive Income Plan" shall mean the A. Copeland Enterprises, Inc. Executive Income Plan (effective as of June 15, 1988) and all amendments thereto as authorized by any resolution

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of the board of directors of the Debtor occurring prior to April 12, 1991, but excluding the Supplemental Executive Retirement Plan purporting to replace and supersede the Executive Income Plan.

"Exemplary Damage Claim" shall mean a Claim of the kind described in Section 726 (a) (4) of the Bankruptcy code, including, without limitation, a Cure Claim to the extent that it is not a compensatory Cure Claim, but excluding a Section 157 (b) (5) Claim.

"Final Order" shall mean an order or judgment of a court as to which (a) any appeal or petition for certiorari or review that has been taken or filed has been finally determined, denied, or dismissed, and (b) the time for initial or further appeal or petitioning for certiorari or review has expired and no timely appeal or petition for certiorari or review has been taken or filed.

"Formula Agreement" shall mean the Formula Agreement dated July 2, 1979, among Copeland, A. Copeland Enterprises, Inc., Popeyes Famous Fried Chicken, Inc. and others, including any amendments thereto, which grants to the

Company the right to use and license, and access to, a certain recipe and formula for preparation of spicy fried chicken, any developments or improvements relating to the production of such recipe and formula, and any additional recipes for products suitable for use in restaurants and take-out establishments operated or franchised by the Company and operated under the so-called "Popeyes Concept".

"Insider" shall include (a) an insider of the Debtor as defined in, but not limited by, Section 101 (31) (B), (E), and (F) of the Bankruptcy Code, (b) an insider of the Company, or of an Affiliate of the Debtor or the Company, as defined for an entity of the appropriate character in, but not limited by, Section 101(31) of the Bankruptcy Code, as though the Company or such Affiliate were the Debtor, and (c) in addition, an Affiliate of the Debtor or the Company.

"Insider Contract" shall mean any executory contract or unexpired lease listed in the Schedule of Insider Contract Assumptions and Rejections.

"Interest" shall mean an equity interest in the Debtor.

"Large Trade Claim" shall mean a Trade Claim that is not a Small Trade Claim.

"Merrill Lynch" shall mean Merrill Lynch & Co., Inc., a Delaware corporation.

"Merrill Lynch Claims" shall mean all Claims of Merrill Lynch against the Debtor, including, without limitation, Claims under the Bridge Loan Agreement.

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

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"Merrill Lynch Litigation" shall mean (a) that certain adversary proceeding filed in the Bankruptcy court and entitled Al Copeland Enterprises, Inc. v. Merrill Lynch & Co., Inc., Adversary Proceeding No. 92-1017-FM, and all matters relating thereto, (b) that certain lawsuit filed in the United States District Court for the Southern District of New York and entitled Merrill Lynch & Co., Inc. v. Al Copeland Enterprises, Inc., Case No. 90 Civ. 7307 (LMM), and all matters relating thereto, and (c) that certain lawsuit filed in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, entitled Al Copeland Enterprises, Inc. v. Merrill Lynch & Co., Inc., et al., Case No. 414-525, and removed on March 25, 1991 to the United States District Court for the Eastern District of Louisiana, and all matters relating thereto.

"Miscellaneous Secured Claim" shall mean (a) a Secured Claim not held by an Acquisition Bank, including, without limitation, any Claim for the delivery of goods or services to the Debtor to the extent of any cash deposit made by the Debtor before, and remaining unapplied on, the Petition Date, and (b) any Unsecured Claim associated with such a Secured Claim as a deficiency claim if the Proponents elect to leave such Claims unimpaired in accordance with Section 1124(2) of the Bankruptcy Code.

"New Common Stock" shall mean the common stock to be authorized under the Articles of Incorporation and issued as provided in Section 6.02 of the Plan.

"New Company" shall mean the corporation organized

under the laws of the State of Minnesota pursuant to the Articles of Incorporation, and successor by merger to the Debtor.

"New Credit Agreement" shall mean a form of Second Amended and Restated Loan Agreement, including exhibits, schedules, and annexes thereto, in the form annexed to the Plan as Exhibit B, with such changes as the Proponents may agree to.

"New Credit Documents" shall mean the New Credit Agreement and all ancillary instruments, documents and agreements evidencing or securing the indebtedness incurred, or otherwise covered by, the New Credit Agreement.

"New Preferred Stock" shall mean the preferred stock to be authorized under the Articles of Incorporation and issued as provided in Section 6.02 of the Plan, with an aggregate liquidation preference of $56 million.

"Non-Insider Contract" shall mean any executory contract or unexpired lease of the Debtor that is not an Insider Contract, whether or not a party thereto is an Insider.

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"Old Common Stock" shall mean the common stock of the Company and any warrants or other rights to acquire such common stock.

"Old Preferred Stock" shall mean the 17.5% Cumulative Exchangeable Preferred Stock issued by the Company on or about September 21, 1989 and from time to

time thereafter, and any rights to acquire, or unpaid dividends with respect to, such preferred stock.

"Petition Date" shall mean April 12, 1991.

"Plan" shall mean this plan of reorganization, together with any exhibits hereto and any documents herein by reference, as the same may be amended, modified or supplemented from time to time in accordance with the provisions set forth herein, the Bankruptcy Code, the Bankruptcy Rules and the Local Rules.

"Preferred Shareholders Agreement" shall mean an agreement among the holders of the New Preferred Stock, the form of which shall be filed with the Bankruptcy Court no later than the Confirmation Hearing Date.

"Preferred Stock Claim" shall mean any Claim with respect to the Old Preferred Stock of the kind described in Section 510(b) of the Bankruptcy Code.

"Priority Claim" shall mean a Claim to the extent that it is entitled to priority under Section 507(a) of the Bankruptcy Code, other than a Superpriority claim, an Administrative Claim, or a Tax Claim.

"Proponents" shall mean, collectively, CIBC, the Acquisition Banks, and any other entity that becomes a co-proponent of the Plan.

"Recipe Royalty Agreement" shall mean the Recipe Royalty Agreement dated as of March 21, 1989, as amended or supplemented, among Copeland, the Company, and

Diversified.

"Reimbursement Claim" shall mean a Claim of a DiP Bank or an Acquisition Bank for reimbursement on account of a draw under a DiP Letter of Credit or an Acquisition Letter of Credit.

"Rejected Insider Contract" shall mean an Insider Contract to the extent designated to be rejected in the Schedule of Insider Contract Assumptions and Rejections.

"Reorganization Case" shall mean the Debtor's case under Chapter 11 of the Bankruptcy Code before the Bankruptcy Court, Case No. 91-12575-FM-11.

"Schedule of Insider Contract Assumptions and Rejections" shall mean the schedule annexed to the Plan as Exhibit C;

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provided however, that at any time an or before the Confirmation Date the Proponents may amend such schedule by notice filed with the Bankruptcy Court.

"Section 157 (b) (5) Claim" shall mean a Claim that is unliquidated or contingent as of the date of the Disclosure Statement Hearing and is of the kind described in 28 U.S.C. § 157 (b) (5)

"Secured Claim" shall mean a Claim that is not a Superpriority Claim, an Administrative Claim, a Cure Claim, or a Tax Claim, but only to the extent that such claim is

determined to be a secured claim under Section 506 (a) of the Bankruptcy Code.

"Small Trade Claim" shall mean a Trade Claim the amount of which does not exceed $1,000, or the amount of which shall be reduced by the holder thereof to $1,000 on the ballot distributed to such holder; provided, however, that all Trade Claims held by a creditor and its Affiliates as of the Petition Date shall be aggregated to determine their status as Small Trade Claims, and no transfers of Trade Claims after the Petition Date shall affect such aggregation.

"Subordinated Insider Claim" shall mean a Claim listed on the schedule annexed to the Plan as Exhibit D; provided, however, that at any time on or before the Confirmation Date the Proponents may amend such schedule by notice filed with the Bankruptcy Court.

"Superpriority Claim" shall mean a Claim to the extent that it is of the kind described in, and is entitled to priority under, Section 364 (c) (1) or Section 507 (b) of the Bankruptcy Code.

"Supply Contract" shall mean the Supply Contract dated as of March 21, 1989, as amended or supplemented, between the Company and Diversified.

"Tax Claim" shall mean a Claim to the extent that it is of the kind described in, and is entitled to priority under, Section 507(a) (7) of the Bankruptcy code.

"Trade Claim" shall mean an Unsecured Claim that, (a) as of the date of the Disclosure Statement Hearing, is not

a Priority Claim, a Miscellaneous Secured Claim, an Acquisition Bank claim, a Section 157 (b) (5) Claim, a Merrill Lynch Claim, an Exemplary Damage Claim, a Preferred Stock Claim, or a Common Stock Claim, and (b) as of the Confirmation Date, is not a Subordinated Insider Claim.

"Unsecured Claim" shall mean a Claim that is not a Secured claim, a superpriority Claim, an Administrative Claim, a Cure Claim, or a Tax Claim.

[Pages 11-13 omitted]

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Section 4.06. Class 7 - Compensatory Cure Claims. Class 7 Claims shall be treated in accordance with Section 7.06 of the Plan.

Section 4.07. Unimpaired Classes. By virtue of the foregoing provisions of this Article IV, the Claims in classes 1, 2, 3A, 4, 6, and 7 are not impaired under the Plan.

ARTICLE V
TREATMENT OF CLASSES IMPAIRED UNDER THE PLAN

Section 5.01. Class 3B - Other Acquisition Bank claims. All Claims in Class 3B shall be Allowed Class 3B Claims in an aggregate amount as of the Effective Date equal to the Acquisition Debt, plus any Acquisition Debt consisting of Reimbursement Obligations under Acquisition Letters of credit arising thereafter, and shall be treated as Allowed Secured Claims to the entire aggregate unpaid balance thereof.

CIBC and each Acquisition Bank, as a holder of an Allowed Class 3B Claim, (a) will receive, on the Effective Date, cash equal to its share of the unpaid balance of the Acquisition Debt other than for principal, (b) will enter into the New Credit Agreement under the Plan, (c) will receive, on or after the Effective Date and on account of its Allowed Class 3B Claims, a Tranche A Term Note in the amount set forth in the New Credit Agreement as the Tranche A Term Loan Commitment of such Acquisition Bank, and (d) will receive (i) on account of its Allowed Class 3B Claims, shares of New Preferred Stock, issued on the Effective Date, with a liquidation preference in the amount set forth in the New Credit Agreement as the Exchanged Amount for such Acquisition Bank, (ii) on account of its Allowed Class 3B Claims, shares representing its Class 3B Percentage of fifty and 1/10 percent (50.1%) of the New Common Stock issued on the Effective Date, and (iii) on account of the Contractual Subordination, its Class 3B Percentage of thirty-one and 9/10 percent (31.9,%) of such New Common Stock transferred in accordance with Section 5.03 (a) (iv) (B) of the Plan; provided, however, that if Class 8 shall reject the Plan, then the distribution of New Common Stock on account of Allowed Class 3B Claims shall constitute one hundred percent (100%) of such New Common Stock.

Section 5.02. Class 5 - Large Trade Claims. Unless otherwise agreed by the holder of an Allowed Large Trade Claim, each such holder shall receive cash equal to eighty-five percent (85%) of the amount of such Allowed Large Trade Claim on the later of the Effective Date or the date upon which such claim becomes an Allowed Large Trade Claim.

Section 5.03. Class 8 - Merrill Lynch Claims (a) If

Class 8 shall accept the Plan in accordance with Section 1126(c) of the Bankruptcy Code, (i) as of the Effective Date, all Claims in Class 8 shall be Allowed Class 8 Claims in the aggregate

[Pages 15-16 omitted]

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Section 6.02. New Stock. On the Effective Date, the New Company, pursuant to the Articles of Incorporation, shall issue for distribution the shares of New Preferred Stock and New Common Stock required for distribution pursuant to the provisions of Article V of the Plan.

Section 6.03. New Credit Agreement; New Credit Documents. On the Effective Date the terms of the New Credit Agreement and the New Credit Documents to be entered by and between the Debtor, CIBC, such other parties as may be necessary, and such other lenders as CIBC may permit to participate by means of assignment or participation, or both, shall become effective.

Section 6.04. Cancellation of Securities. On and as of the Effective Date, the Old Preferred Stock and the Old Common Stock shall be cancelled and rendered null and void.

Section 6.05. Retiree Benefits. (a) On the Effective Date, pursuant to Section 1129 (a) (13) of the Bankruptcy Code, the New Company will continue to be obligated to pay all retiree benefits, as that term is defined in section 1114 of the Bankruptcy Code, and shall continue to pay such retiree benefits as they become due at the level(s) established at any

time prior to the Confirmation Date pursuant to Subsection (e) (1) (B) or (g) of said Section 1114, for the duration of the period the Debtor has obligated itself to provide such benefits.

(b) The benefits of William A. Copeland, III under the Executive Income Plan shall be treated as 100% vested on the Effective Date and shall be allowed and payable commencing upon cessation of employment by the Debtor, whether such cessation is voluntary or involuntary. Such benefits shall be paid in accordance with the Executive Income Plan in one hundred twenty (120) monthly installments of $10,417.00 each. Nothing in this Section 6.05 shall have the effect of allowing any Claim under the Executive Income Plan other than such Claim of William C. Copeland, III.

Section 6.06. Copeland Consent. If the parties thereto shall execute, acknowledge, and return the Copeland Consent an or before the Ballot Deadline, or at such later time as the Proponents shall agree in writing, and if the Effective Date shall occur, then (a) the terms of the Copeland Consent shall control and supersede any inconsistent provisions of the Plan, and (b) the Debtor shall be bound by the terms of Copeland Consent.

Section 6.07. Disputed Claims. (a) Except with respect to those claims the holders of which have and preserve the right to liquidation of such Claims before a court other than the Bankruptcy Court pursuant to 28 U.S.C. § 157(b) (5), all Disputed Claims shall be liquidated and determined, and allowed or disallowed, by the Bankruptcy Court, subject to the discretion

granted under the applicable sections of Title 28 of the United States Code.

(b) The Bankruptcy Court may, on or prior to the Confirmation Date or such date or dates thereafter as the Bankruptcy Court may set, fix or liquidate the amount of any contingent or unliquidated Claim or Interest pursuant to section 502 (c) of the Bankruptcy Code, in which event the amount so fixed or liquidated shall be deemed to be the amount of such contingent or unliquidated Claim or interest pursuant to Section 502 (c) of the Bankruptcy Code for purposes of distribution under the Plan.

(c) The Debtor shall not be required to create or maintain any reserves for the payment of Disputed Claims.

ARTICLE VII
EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 7.01. Supply contract. On, and by virtue of the occurrence of, the Effective Date, the Supply Contract shall be assumed, and assigned by the Debtor to the New Company, in accordance with Sections 365 and 1123 (b) (2) of the Bankruptcy Code and by virtue of the merger of the Debtor into the New Company.

Section 7.02. Formula Agreement and Recipe-Royalty Agreement. On, and by virtue of the occurrence of, the Effective Date, the Formula Agreement and the Recipe Royalty Agreement shall be assumed, and assigned by the Debtor to the New Company, in accordance with Sections

365 and 1123 (b) (2) of the Bankruptcy Code and by virtue of the merger of the Debtor into the New Company; provided, however, that if the Bankruptcy Court so rules, the Confirmation Order shall include a determination that the "Termination Date" (as defined in the Recipe Royalty Agreement) shall never occur.

Section 7.03. Insider Contracts. (a) On, and by virtue of the occurrence of, the Effective Date, the Assumed Insider Contracts as shall be assumed, and assigned by the Debtor to the New Company, in accordance with Sections 365 and 1123 (b) (2) of the Bankruptcy Code and by virtue of the merger of the Debtor into the New Company; provided, however, that such assumption and assignment shall be without prejudice to any right of the Debtor, or of the New Company as successor to the Debtor, to reform any Assumed Insider Contract under applicable nonbankruptcy law.

(b) On and by virtue of the occurrence of, the Effective Date, the Rejected Insider Contracts shall be rejected in accordance with Sections 365 and 1123 (b) (2) of the Bankruptcy code. Any claim arising in favor of any insider under Sections 365 (g) (1) and 502 (g) of the Bankruptcy Code on account

[Page 19-21 omitted]

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(vii) one or more decrees authorizing the assumption, assumption and assignment, or rejection, or ordering the enforcement, of executory contracts and unexpired leases in accordance with Article VII of

the Plan or the Copeland Consent;

(viii) authority for the New Company in accordance with Section 9.03 of the Plan, and a determination that the prosecution of any claim pursuant to Section 9.03 of the Plan, including claims in the Copeland Proceedings, is for the benefit of the Estate notwithstanding that any recovery may remain with the New Company or be used to repay indebtedness restated or incurred under the New Credit Agreement;

(ix) making the provisions of the Confirmation order non-severable and mutually dependent; and

(x) such other provisions as the Proponents shall deem necessary or appropriate in their sole discretion; and

(b) all Tax Claims shall be resolved, or in the process of resolution, in a manner satisfactory to the Proponents.

8.02 Conditions to Consummation. Conditions to the consummation of the Plan, unless waived in writing by the Proponents, shall be that (a) all conditions to confirmation of the Plan shall have been satisfied, and (b) the Confirmation order shall not have been reversed and no stay thereof shall be in effect.

Excerpts from Fourth Amended Plan of Reorganization as Modified, and Bankruptcy Court's Order of October 22, 1992

ARTICLE IX
EFFECTS OF PLAN CONFIRMATION

Section 9.01. Discharge. Except as otherwise expressly provided in section 1141 of the Bankruptcy Code or the Plan, the distributions made pursuant to the Plan will be in full and final satisfaction, settlement, release and discharge as against the Debtor of any debt that arose before the Confirmation Date and any debt of a kind specified in sections 502 (g), 502 (h) or 502 (i) of the Bankruptcy Code and all Claims and interests of any nature, including, without limitation, any interest accrued thereon from and after the Petition Date, whether or not (i) a proof of a Claim or interest based an such debt, obligation or interest is filed or deemed filed under section 501 of the Bankruptcy Code, (ii) such Claim or Interest is allowed under Section 502 of the Bankruptcy Code, or (iii) the holder of such Claim or Interest has accepted the Plan. Therefore, upon the Effective Date, all holders of Claims and Interests shall be precluded from asserting against the Debtor or the New Company,

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or against any assets or properties of the Debtor or the New Company, any other or further Claims or Interests based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date, and the Confirmation Order shall permanently enjoin said holders of Claims and Interests, their successors and assigns, from enforcing or seeking to enforce any such Claims or Interests against the Debtor, the New Company, or their respective assets or property.

Section 9.02. Revesting. On the Effective Date, except as otherwise expressly provided in the Plan, the Confirmation order, the New Credit Agreement or the New Credit Documents, the Debtor will be vested with all of the property of the Estate free and clear of all claims, liens, encumbrances, charges and other interests of creditors and equity security holders, and may operate its businesses free of any restrictions imposed by the Bankruptcy Code or by the Bankruptcy Court.

Section 9.03. Retention and Enforcement of Causes of Action. Except as otherwise provided in the Copeland Consent or the Confirmation Order, nothing contained in the Plan shall be deemed to be a waiver or relinquishment of any claims, rights, or causes of action that constitute property of the Estate or of the Debtor, whether arising under the Bankruptcy Code or under nonbankruptcy law, all of which are expressly (a) retained and may be enforced by the Debtor and any successors in interest, including the New Company, and (b) may be pursued, as appropriate, in accordance with the best interests of the Debtor, the New Company, or such successors. Without limiting the generality of the foregoing, the Debtor or the New Company may initiate, pursue, settle, or abandon the Copeland Proceedings in its sole discretion and without the approval of the Bankruptcy Court.

Section 9.04. Retention of Jurisdiction. Notwithstanding entry of the Confirmation Order or the Effective Date having occurred, the Bankruptcy Court, to the extent permitted and subject to the discretion granted under the applicable sections of Title 28 of the United States Code, will retain jurisdiction (a) to determine any Disputed Claims, (b) to determine requests for payment of Claims entitled to

priority under section 507 (a) (1) of the Bankruptcy Code, including compensation of and reimbursement of expenses of parties entitled thereto, (c) to resolve controversies and disputes regarding interpretation and implementation of the Plan, (d) to enter orders in aid of the Plan, including, without limitation, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, (e) to modify the Plan pursuant to Section 10.03 of the Plan, (f) to determine any and all applications, Claims, Interests, adversary proceedings and contested or litigated matters pending on the Effective Date or commenced after the Effective Date as contemplated in the Plan, (g) to allow, disallow, estimate, liquidate or determine any Claim or Interest (including, without

[Page 24]

limitation, Claims that are either not Allowed Claims or Disputed Claims) and to enter or enforce any order requiring the filing of any such Claim before a particular date, (h) to determine any and all pending applications for the rejection or disaffirmance of executory contracts or leases, or for the assumption or assignment of executory contracts and leases, and to hear and determine, and if need be to liquidate, any and all Claims arising therefrom, (i) to determine any disputes or controversies arising under the Copeland Consent, (j) to determine any actions or controversies described in Section 9.03 of the Plan, including the Copeland Proceedings, and (k) to enter a final decree closing the Reorganization Case.

Section 9.05. Post-Consummation Effect of Evidences of Claims or Interests. Notes, stock certificates and other evidences of Claims against or Interests in the Debtor shall,

effective upon the Effective Date, represent only the right to participate in the distributions contemplated by the Plan.

Section 9.06. Failure of Court to Exercise Jurisdiction. If the Court abstains from exercising or declines to exercise jurisdiction, or is otherwise without jurisdiction over any matter arising out of the Reorganization case, including the matters set forth in this Article IX, this Article IX shall not prohibit or limit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such matter.

Section 9.07. Term of Injunctions or Stays. Unless otherwise provided, all injunctions or stays provided for in the Reorganization Case pursuant to Section 105 or 362 of the Bankruptcy Code or otherwise and in effect on the Confirmation Date shall remain in full force and effect until the Effective Date.

ARTICLE X
MISCELLANEOUS PROVISIONS

Section 10.01. Unclaimed Distributions. If any person entitled to receive cash or securities directly from the Debtor under the Plan cannot be located on the Effective Date, such cash or securities will be set aside and (in the case of cash) held in a segregated, interest-bearing fund to be maintained by the New Company. If such person is located within one year of the Effective Date, such cash or securities, together with any interest or dividends earned thereon will be paid or distributed to such person. If such person cannot be located within one year of the Effective Date, any such cash or securities and accrued interest or dividends thereon will become the property of and shall be released to the New

Company; provided, however, that nothing contained in this Plan shall require the New Company to attempt to locate such person.

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Section 10.02. Fractional Dollars. Any other provision of the Plan notwithstanding, no payments of fractions of dollars will be made to any holder of an Allowed Claim or interest. Whenever any payment of a fraction of a dollar to any holder of an Allowed Claim or Interest would otherwise be called for, the actual payment made will reflect a rounding down of such fraction to the nearest whole dollar.

Section 10.03. Modification of Plan. The Proponents reserve the right, in accordance with the Bankruptcy Code, to amend or modify the Plan prior to the entry of the Confirmation order by unanimous consent. After the Effective Date, the New Company may, upon order of the Court, amend or modify the Plan in accordance with section 1127(b) of the Code, or remedy any defect or omission or reconcile any inconsistency in the Plan in such manner as may be necessary to carry out the purpose and intent of the Plan. Such modifications shall not include modifications to any of the Copeland Consent, which modifications may be effectuated only with the consent of Copeland.

Section 10.04. Withdrawal of Plan. The Proponents reserve the right, at any time prior to entry of the Confirmation Order, to revoke and withdraw the Plan. If the Proponents revoke or withdraw the Plan under this section, or if entry of the Confirmation order does not occur, then the Plan shall be deemed null and void. In that event, nothing

contained in the Plan shall be deemed to constitute a waiver or release of any Claims by or against the Debtor or any other person, or to prejudice in any manner the rights of the Debtor or any other person in any further proceedings involving the Debtor or any other person.

Section 10.05. Cramdown. The Proponents request Confirmation under Section 1129 (b) of the Bankruptcy Code if (i) any impaired Class does not accept, or is deemed not to accept, the Plan pursuant to Section 1126 of the Bankruptcy Code, and (ii) all of the holders of Claims or Interests in such Class do not waive in writing the protections afforded to them by Section 1129(b) of the Bankruptcy Code, or stipulate in writing that the requirements of Section 1129(b) of the Bankruptcy Code are satisfied as to such Class. In that event, the Proponents reserve the right to modify the Plan to the extent, if any, that Confirmation pursuant to Section 1129(b) of the Bankruptcy Code requires modification.

Section 10.06. Payment Dates. Whenever any payment to be made under the Plan is due on a day other than a Business Day, such payment will instead be made, without interest, on the next Business Day.

Section 10.07. Headings. The headings used in this Plan are inserted for convenience only and neither constitute a portion of the Plan nor in any manner affect the provisions of the Plan.

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Section 10.08. Successors and Assignees. The rights, benefits and obligations of any person named or referred to in

the Plan will be binding upon, and will inure to the benefit of, the heirs, executors, administrators, successors and assigns of such person. Without limiting the generality of the foregoing, upon occurrence of the Effective Date and by virtue of the merger of the Debtor into the New Company, the New Company shall succeed to and be bound by all of the rights and obligations of the Debtor under the Plan, including, without limitation, all rights and obligations of the Debtor under Section 9.03 of the Plan or relating to Disputed Claims pending as of the Effective Date and Disputed Claims that become Allowed Claims subsequent to the Effective Date.

Section 10.09. Governing Law. The Plan and the rights and obligations of any person named or referred to in the Plan shall be governed by, and construed and interpreted in accordance with, (a) the law of the United States to the extent required by law, or (b) the law of the State of New York (excluding its choice-of law rules) in all other instances or respects.

Dated: October 20, 1992

CANADIAN IMPERIAL BANK OF COMMERCE,
as Agent

By: /s/_____
R. Bruce Layman
Assistant General Manager

APPENDIX 6

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
April 7, 1993
U.S. District Court
Clerk's Office
By /s/_____ Deputy

In RE:	§	
	§	Case No. 91-15275-FM-11
AL COPELAND	§	
ENTERPRISES, INC.	§	Chapter 11
Debtor.	§	

ORDER REGARDING CLAIM OF GEORGE SAMARAS CLAIM NUMBER 1148

The Court having considered the claim of George Samaras, Claim Number 1148, and the objection filed thereto by Al Copeland Enterprises. Inc., and having received the announcement of George Samaras and America's Favorite Chicken Company, successor-in-interest to Al Copeland Enterprises, Inc., finds as follows:

1. *George Samaras v. Al Copeland Enterprises, Inc.*, Cause No. 90-CI-12735 is currently pending before the 37th Judicial District Court of Bexar County, Texas.

Bankruptcy's Court Order of April 7, 1993, Regarding Claim of George Samaras

2. The parties to the foregoing lawsuit wish to proceed with the liquidation of this claim in state court.

IT IS THEREFORE ORDERED that the parties to the foregoing lawsuit may obtain a judgment, and exhaust any appeals or writs of certiorari relating to such judgment.

IT IS FURTHER ORDERED that upon the exhaustion of any appeals or writs of certiorari or in the event of a settlement, the liquidated amount, if any, or such judgment shall be classified as a Class 5 Large Trade Claim and shall be deemed allowed under Section 5.02 of the Debtor's Fourth Amended Plan of Reorganization as approved by this Court by Order signed October 22, 1992, and such claim shall be paid in accordance with Section 5.02 of the Plan.

/s/_____
HONORABLE FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

AGREED AS TO FORM AND SUBSTANCE:

By: /s/_____
Cindy A. Mikel
State Bar No. 14031950
OVERSTREET, WINN & EDWARDS, P.C.
1209 West 5th Street
Austin, Texas 78703

ATTORNEYS FOR AMERICA'S FAVORITE CHICKEN COMPANY

Bankruptcy's Court Order of April 7, 1993, Regarding Claim of George Samaras

By: /s/_____

Bernard W. Fischman
State Bar No. 07043500
TINSMAN & HOUSER. INC.
700 N. St. Mary's Street
One Riverwalk Place, 14th Floor
San Antonio, Texas 78205

ATTORNEYS FOR GEORGE SAMARAS

APPENDIX 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
October 10, 1995
U.S. Bankruptcy Court
By /s/ MC Deputy

IN RE:	§	
	§	Case No. 91-15275-FM-11
AL COPELAND	§	
ENTERPRISES, INC.	§	Chapter 11
Debtor.	§	

ORDER ON MOTION BY REORGANIZED DEBTOR AMERICAS FAVORITE CHICKEN COMPANY FOR CLARIFICATION OF ORDER REGARDING CLAIMS OF GEORGE SAMARAS

On September 6, 1995, came before the Court the Motion by Reorganized Debtor America's Favorite Chicken Company for Clarification of Order Regarding Claims of George Samaras (the "Motion"). In the Motion, America's Favorite Chicken Company requested this Court to clarify the Order Regarding Claims of George Samaras (the "Order"), which had been agreed to by both parties, to provide that this Court could (if necessary) determine the allowability, under the plan of reorganization and bankruptcy law, of such items

as post-petition interest, attorneys' fees, and costs. Having read and considered the pleadings and heard the argument of counsel, the Court is of the following opinion:

Insofar as the Motion requests that the Order be amended to bifurcate the consideration of state law issues by the Texas state courts and the consideration of bankruptcy law issues by the federal bankruptcy court, the Motion is DENIED because the Order placed the parties in front of the state court to decide the claim for all purposes, state law and federal bankruptcy law. Accordingly, this Court declines to retake jurisdiction over part of a contested matter that the parties agreed in the Order to allow the state court to exercise its concurrent jurisdiction over. All matters are to be determined by the state court.

It is so ORDERED.

Signed this 10th day of October, 1995.

/s/ _____
Frank R. Monroe
United States Bankruptcy Judge

Bankruptcy Court's Order, of October 10, 1995, on Motion of Reorganized Debtor for Clarification of Order

AGREED AS TO FORM:

/s/_____
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Attorneys for America's Chicken Company

/s/_____
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Attorneys for George Samaras

APPENDIX 8

COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS
SAN ANTONIO

Appeal from the 166th District Court of Bexar County
Trial Court No. 90-CI-12735
Honorable Martha Tanner, Judge Presiding

OPINION
Appeal No. 04-95-00501-CV

AMERICA'S FAVORITE	§	
CHICKEN COMPANY	§	
f/k/a Al Copeland	§	[FILED September 4, 1996]
Enterprises, Inc.,	§	
Appellant,	§	
	§	
v.	§	
	§	
George SAMARAS,	§	
Appellee.	§	

Opinion by: Tom Rickhoff, Justice

Sitting: Tom Rickhoff, Justice
Paul W. Green, Justice
Sarah B. Duncan, Justice

Opinion and Judgment of the Court of Appeals of Texas (4th District) with Orders Denying Rehearing and Review

Delivered and filed: September 4, 1996

AFFIRMED.

Appellant, America's Favorite Chicken Co., formerly known as Al Copeland Enterprises, Inc. ("AFC"), appeals from a judgment rendered in favor of appellee, George Samaras ("Samaras"), in a breach of contract action. The jury found AFC failed to comply with the terms of a letter agreement between AFC and Samaras and awarded Samaras $1,522,586.00 in actual damages, $685,163.60 in attorney's fees, and post-judgment interest on such sums at the rate of ten percent. In nine points of error, AFC contends: (1) the evidence was legally and factually insufficient to support the trial court's conclusion that the contractual provision sought to be enforced was sufficiently definite to be enforceable; (2) the trial court erroneously excluded certain questions from the jury charge and also included an erroneous instruction therein; (3) the evidence was legally and factually insufficient to support the jury's actual damage award; and (4) federal bankruptcy law precludes the recovery of attorney's fees and post-judgment interest. We affirm the trial court's judgment.

FACTS

The dispute between AFC and Samaras centers on the language contained in paragraph C of a letter agreement entered into between the parties on June 15, 1988 regarding Samaras' employment as Vice-President of Operations for A.

Copeland Enterprises, Inc.[1] Paragraph C related to an additional form of compensation to be provided Samaras and reads as follows:

C. BUILD-TO-SUIT RESTAURANTS

The company will provide you with two build-to-suit restaurants (land and building); one after 12 months and one after 18 months with all franchise fees waived.

It is undisputed that Samaras accepted employment and performed his services until asked to resign from the company in January of 1990, and he received all other compensation.

After Samaras had been employed by the company for almost one year, Samaras testified that he approached Jim Flynn, the president of the company at that time, to inquire about his build-to-suit rights. Samaras testified that both Flynn and Bill Copeland, the chief operating officer, told him that the company was not in a financial position to proceed with a build-to-suit restaurant at that time.[2] The testimony of Lewis "Bucky" Kilbourne, the chief financial officer, confirmed Samaras' testimony with regard to the company's financial position. Kilbourne stated that the chief executive officer, Al

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[1] Al Copeland Enterprises, Inc. was reorganized through a Chapter 11 bankruptcy and became known as America's Favorite Chicken Company.

[2] AFC had acquired the Church's Fried Chicken chain in the fall of 1988, and the daily debt service was approximately $160,000.00.

Copeland, would not have allowed the money to be spent on Samaras' build-to-suit restaurants because it would have been counterproductive to the company. Kilbourne recommended to Flynn that Samaras be offered something else to fulfill AFC's obligation and suggested either cash or existing restaurant franchises.

Bill Copeland, the chief operating officer, testified that although it was suggested that Samaras might want to explore the possibility of accepting existing restaurants, Samaras was never told not to submit designated sites for the build-to-suit restaurants, which was the first step in the build-to-suit process. Flynn testified, however, that the company assisted in this step of the process by providing the aid of the company's real estate representatives. Samaras testified that this aid was never offered and he did not seek such aid or pursue designating sites due to the negative response he had already received.

Upon Samaras' termination in January of 1990, AFC sent him a letter detailing its final obligations to him. The letter reserved the issue of the build-to-suit restaurants, and Samaras spoke with AFC's newly-appointed chief operating officer, Carl Hays, to confirm that his rights with regard to the company's build-to-suit obligation were not being waived. Samaras then proceeded in an effort to reach an acceptable compromise to AFC's original build-to-suit obligation by considering existing restaurants. On July 12, 1990, Samaras sent a letter to Al Copeland venting his frustration over AFC's unresponsive stance to proposed restaurant locations. Finally, when Samaras received a letter from AFC dated August 30, 1990, stating that further negotiations would be futile, Samaras filed the action from which the instant appeal

is taken.

ARGUMENTS ON APPEAL

In this appeal, AFC raises nine points of error contending: (1) the evidence was legally and factually insufficient to support the trial court's conclusion that the contractual provision sought to be enforced was sufficiently definite to be enforceable; (2) the trial court erroneously excluded certain questions from the jury charge and also included an erroneous instruction therein; (3) the evidence was legally and factually insufficient to support the jury's actual damage award; and (4) federal bankruptcy law precludes the recovery of attorney's fees and post-judgment interest.

1. Enforceability of Contract

In its first point of error, AFC maintains the trial court erred in overruling its motions for judgment n.o.v. and for new trial because there was no evidence or insufficient evidence that the contractual provision Samaras sought to enforce was sufficiently definite to make it an enforceable obligation. AFC asserts that essential terms of the obligation were uncertain or left open for future negotiations.

a. Standard of Review

AFC couches its point of error in terms of an evidentiary review; however, we do not find this to be the appropriate standard of review. The parties do not dispute the existence of the agreement or that the letter agreement obligated AFC to provide Samaras with two build-to-suit

restaurants. *See Central Texas Micrographics v. Leal,* 908 S.W.2d 292, 297 (Tex.App.--San Antonio 1995, no writ)(when the existence of a term is disputed, a question of fact is raised subject to sufficiency review). Rather, the issue in the instant case is whether the language expressly set forth in the letter agreement relating to this obligation was sufficiently definite to be enforceable against AFC.

A contract is not enforceable unless the court can determine the parties' legal obligations and liabilities. *T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 221 (Tex.1992); *Gannon v. Baker*, 830 S.W.2d 706, 709 (Tex.App.--Houston [1st Dist.] 1992, writ denied); *University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex.App.--San Antonio 1989, no writ). In order to be enforceable, therefore, the parties must have agreed on the material terms. *T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d at 221. If an essential term is left open for future negotiation, the contract is not binding. *Id.*; *Cap Rock Elec. Co-op., Inc. v. Texas Utilities Elec. Co.*, 874 S.W.2d 92, 99 (Tex.App.--El Paso 1994, no writ) "Whether an agreement is legally enforceable or binding is a question of law." *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 814 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dism'd*, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988). The jury may not be called upon to construe the legal effect of an agreement or to supply an essential term upon which the parties did not mutually agree. *Id.*; *see also University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d at 710. Therefore, we conclude that the issue of whether an agreement fails for indefiniteness is a question of law to be determined by the

court.[3]

A trial court's legal conclusions are always reviewable on appeal, and the appellate court is not obligated to give any particular deference to those conclusions. *Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 935 (Tex.App.--El Paso 1994, no writ). Rather, the appellate court, as final arbiter of the law, is required to independently evaluate the trial court's legal determinations. *Id.* A trial court's legal conclusions will not be reversed on appeal unless they are erroneous as a matter of law. *Hofland v. Fireman's Fund Ins. Co.*, 907 S.W.2d 597, 599 (Tex.App.--Corpus Christi 1995, no writ).

In construing an agreement, the court may consider evidence of circumstances surrounding its execution. *Sun Oil*

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[3] Although AFC agreed during oral argument that the issue of indefiniteness appeared to be a question of law, AFC asserted that it used the legal and factual sufficiency standards of review based on the Texas Supreme Court's decision in *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex.1992). The court of appeals in *T.O. Stanley Boot Co.*, however, concluded that there was no binding agreement as a matter of law. *Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279, 289 (Tex.App.--El Paso 1991), *aff'd in part, rev'd in part*, 847 S.W.2d 218 (Tex.1992). The Texas Supreme Court then reviewed the material terms of the contract in light of the evidence presented and also concluded that it failed for indefiniteness. *T.O. Stanley Boot Co.*, 847 S.W.2d at 221-22. Therefore, although the Court was responding to a "no evidence" point of error, we believe the Court reviewed the court of appeals' determination as to the definitiveness of the contract as a legal conclusion.

Co. (Delaware) v. Madeley, 626 S.W.2d 726, 731 (Tex.1981); *Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d 820, 823 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Furthermore, a trial court is permitted to construe words and terms in an agreement as such terms are usually understood by persons in the profession, business or industry. *See KMI Continental Offshore Production Co. v. ACF Petroleum Co.*, 746 S.W.2d 238, 241 (Tex.App.--Houston [1st Dist.] 1987, writ denied); *Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d 243, 249 (Tex.App.--Amarillo 1987, writ vacated); *cf. Atlantic Richfield Co. v. ANR Pipeline Co.*, 768 S.W.2d 777, 783 (Tex.App.--Houston [14th Dist.] 1989, no writ)(discussing supplementation or explanation by usage of trade under TEX. BUS & COM.CODE § 2.202). The trial court should also consider the contractual language in light of the experience of the parties and their familiarity with the meaning of technical terms used in the business or industry. *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 347 (1955); *Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d at 249-50; *Sumners v. Hohenberger*, 356 S.W.2d 804, 805-06 (Tex.Civ.App.--San Antonio 1962, writ ref'd n.r.e.).

Where the evidence shows that the parties intended to enter into an agreement, the courts should find the contract to be definite enough to grant a remedy provided that there is a certain basis for determining the remedy. *See Texas Oil Co. v. Tenneco*, 917 S.W.2d 826, 830 (Tex.App.--Houston [14th Dist.] 1994, writ granted) (citing RESTATEMENT (SECOND) OF CONTRACTS). Uncertainty of terms may preclude one remedy without affecting others. *Id.* For example, more certainty is necessary in an action for specific

performance than is necessary in an action for damages. *Pace Corp. v. Jackson*, 284 S.W.2d at 345; *Tenneco*, 917 S.W.2d at 830.

As Samaras asserts in his brief, AFC's representative acknowledged at trial that the letter agreement imposed an obligation on AFC to provide two build-to-suit restaurants at the times designated with all franchise fees waived. The term "build-to-suit" was defined as a standard industry term requiring AFC to acquire land in a market selected by Samaras subject to AFC's review and approval and to construct a building thereon to suit Samaras. There was further evidence at trial that the building would be constructed from two basic sets of plans which were patented by AFC depending upon the size of the site.

AFC argued that notwithstanding the industry definition of the term "build-to-suit," the letter agreement was uncertain because the amount, duration and repayment terms under the lease agreement were not established and the franchise agreement was not negotiated. With respect to the franchise agreement, however, it appears from the testimony introduced at trial that a new franchisee, such as Samaras, was not permitted to negotiate the terms of the franchise agreement, but was required to accept the form as contained in the Uniform Franchise Offering Circular. This requirement was based on federal and state securities laws which would preclude a more favorable offering to an insider in the absence of express disclosures by AFC.

The more compelling aspect of AFC's argument relates to the repayment terms under the lease agreement. Under a build-to-suit arrangement, AFC would acquire the

land, build the structure and lease it back to Samaras for a term of twenty years. The lease rate would be based on a discounted cash flow rate sufficient to enable AFC to recover the cost of the acquisition and construction. In addition, if the structure was built using funds obtained through a loan from a bank or other outside financial institution, the discounted cash flow rate would also include an amount sufficient to cover the interest rate payable on such loan. Alternatively, if the structure was built using internal funds, the discounted cash flow rate would include a market rate of return.

At the time the letter agreement was signed, it was not determined whether AFC would finance the build-to-suit restaurants internally or externally. Furthermore, a market rate of return is based on the market at the time in question, and the ability to determine that market rate in advance would be highly questionable. At trial, Samaras testified the market rate of return at the time the build-to-suit restaurants were to be undertaken was around 12%. Samaras later testified the lease percent would be around 9-11%. Jim Flynn testified the rate of return would be 10-12%. Lewis Kilbourne testified the "profit margin" on build-to-suit was 12-13%. Finally, John Drinen, AFC's representative at trial, testified the rate would be 12-15%.

The law favors finding agreements sufficiently definite for enforcement, particularly in this instance where Samaras had already provided the services for which the compensation was to be paid.[4] *See Tanenbaum Textile Co. v. Sidran*, 423

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[4] Having been given the benefit of Samaras' services, AFC now seeks to deny Samaras the full compensation package he

S.W.2d 635, 637 (Tex.Civ.App.--Dallas 1967, writ ref'd n.r.e.); *see also ERC Mortgage Group, Inc. v. Luper*, 32 Ark.App. 19, 795 S.W.2d 362, 364 (1990) (noting policy disfavoring nonenforcement of contract due to uncertainty under Arkansas law). Where parties have entered into an agreement containing all essential terms except price, courts have been willing to presume a reasonable price was intended and have held that the absence of the price term does not cause the contract to fail for indefiniteness. *See Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex.1966); *Pennington v. Jerry F. Gurkoff, D.O., P.A.*, 899 S.W.2d 767, 770 (Tex.App.--Fort Worth 1995, writ denied). Similarly, we hold that the contract to provide two build-to-suit restaurants should not fail because the parties did not set forth the market rate of return which would be included in determining the lease amount in the event internal financing was used. A reasonable market rate of return can be implied. Therefore, we find "[t]he contract was about as definite and certain as the parties could have made it under the circumstances, and it was sufficiently definite and certain to furnish a basis for arriving with reasonable certainty at the minimum damages which

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was promised. We note that were we to hold the build-to-suit obligation unenforceable as a matter of law, AFC could arguably avoid any similar commitment made to other employees. We further note that in the event Samaras had breached the agreement, AFC would not likely have believed itself barred from enforcing the contract on the basis that uncertainty in the build-to-suit obligation rendered the entire agreement unenforceable.

[Samaras] would suffer by reason of [AFC's] breach"[5] *Pace Corp. v. Jackson*, 284 S.W.2d at 347.

2. Jury Charge

The trial court submitted one broad-form question to the jury regarding AFC's alleged breach, specifically: "Did Al Copeland Enterprises, Inc. fail to comply with paragraph C of the June 15, 1988 agreement (Plaintiff's Exhibit 3)?" Accompanying this question was the following instruction:

In answering this question, consider what the parties, at the time of the agreement, intended the words "The company will provide you with two build-to-suit restaurants

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[5] This is not a case where the lease payment is the consideration being given in exchange for the obligation undertaken by the other party as in *T.O. Stanley Boot Co. v. Bank of El Paso* 847 S.W.2d 218, 221 (Tex.1992), wherein the amount of interest paid was determinative of whether the bank would agree to loan money. Rather, in this case, the value of Samaras' services was the consideration given to AFC in exchange for the various benefits Samaras was to receive from AFC. We believe that if the value of Samaras' services to AFC was dependent upon the rate of return used in determining the amount of the lease payment in connection with the build-to-suit undertaking, AFC would have ensured that such rate of return was expressly set forth in the agreement. Thus, we question whether the rate of return under the build-to-suit obligation can be considered an "essential term" in this arrangement; however, we hold that if it is an essential term, the rate of return can be implied so that paragraph C of the letter agreement sufficiently defines the build-to-suit obligation with reasonable certainty, thereby enabling Samaras to recover damages for its breach.

(land and building)" to mean. In determining the intended meaning of those words, consider all the fact and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the parties' conduct, and the custom and usage in the industry.

The trial court also submitted a four-part question regarding whether AFC's failure to comply was excused by ratification, waiver, repudiation or estoppel, which were all raised as affirmative defenses in AFC's amended original answer.

In points of error two through five, AFC contends that the trial court erred in refusing to submit certain questions and in including the foregoing instruction.

a. Standard of Review

An abuse of discretion standard is employed to review error in a charge. *Texas Dep't of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex.1990); *H.E. Butt Grocery Co. v. Bilotto*, 928 S.W.2d 197, 199 (Tex.App.--San Antonio 1996). The trial court abuses its discretion by acting arbitrarily, unreasonably or without consideration of guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986); *Bilotto*, 928 S.W.2d 197, 199. "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion...." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992); *Bilotto*, 928 S.W.2d at 199.

A trial court is required to submit a cause to the jury upon broad-form questions whenever feasible; provided that the questions fairly submit the disputed issues raised by the pleadings and evidence for the jury's determination. TEX.R. CIV. P. 277; *see also Neuro-Developmental Associates of Houston v. Corporate Pines Realty Corp.*, 908 S.W.2d 26, 28 (Tex.App.--Houston [1st Dist.] 1995, writ denied). A trial court has considerably more discretion when submitting instructions than when submitting questions. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 496 (Tex.App.--San Antonio 1994, writ denied). Nevertheless, TEX.R. CIV. P. 277 states that the court shall submit such instructions "as shall be proper to enable the jury to render a verdict." An explanatory instruction that is a correct statement of the law as applicable to the facts is proper. *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 705 (Tex.App.--Houston [14th Dist.] 1991, writ denied). Even if an instruction contains a correct statement of law, however, the trial court should refuse to submit it where the instruction is unnecessary. *Id.*

a. Inclusion of Terms

In its second point of error, AFC contends the trial court erred in refusing to submit a question inquiring as to whether the parties intended the contractual provision at issue, paragraph C of the letter agreement, to include the following terms: (a) that AFC would provide financing to Samaras to pay for two Popeye's franchise restaurants; (2) that Samaras would have the option to submit locations of build-to-suit restaurants for AFC's approval; (3) that upon site selection, AFC and Samaras would negotiate the lease agreements; and (4) that Samaras would be required to sign and comply with franchise agreements.

AFC argues that its requested issue was proper citing 4 TEX. PATTERN JURY CHARGES § 101.01 (1990 & Supp.1992-93) (hereinafter cited as "PJC") and *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554 (Tex.1972). AFC concedes, however, that it was difficult to "reconcile Scott and PJC §§ 101.01-02 with *Stanley Boot*, which appears to hold that questions of uncertainty and indefiniteness of terms are matters of law for a court."

AFC's argument in reliance on PJC § 101.01 ignores the additional comments contained under that section. The comment entitled "Essential Terms" notes that a failure to include all essential terms renders a contract unenforceable. PJC § 101.01, comment. We have already held that whether an agreement is legally enforceable or binding is a question of law, and a jury may not be called upon to supply an essential term upon which the parties did not mutually agree. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d at 814; *University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d at 710. The caveat to the "Essential Terms" comment in PJC § 101.01 notes that where omitted terms are supplied by application of law, no issue as to the terms of the agreement should be submitted.

In addition, AFC's reliance on Scott is also misplaced because the question there held to be factual related to the existence of an agreement. *See Scott*, 489 S.W.2d at 554-55; *see also Leal*, 908 S.W.2d at 297. In the instant case, the parties do not dispute the existence of the agreement, nor do they dispute the terms contained therein. Rather, the dispute concerns whether the terms contained in the agreement constitute all the essential terms necessary to make the obligation sufficiently definite to be enforceable, which is a question of law to be determined by the court.

The question AFC requested would have asked the jury to interpret the legal effect of the contractual language. The trial court did not abuse its discretion in refusing to submit such a question. *See Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d at 825-26 (noting that presenting a question of law to a jury is erroneous).

b. Anticipatory Repudiation

In its third point of error, AFC complains of the trial court's failure to submit anticipatory repudiation as the controlling issue in the case rather than the failure to comply issue that the trial court submitted.[6] AFC contends the case was tried on the issue of anticipatory repudiation and asserts that the issue submitted "merely preordained an obvious answer to an uncontested issue."

Samaras alleged in his petition that AFC's refusal to honor its obligations was an "express breach and/or and an anticipatory breach." Even assuming AFC had repudiated the agreement in the instant case, the law is well-settled in Texas that when one party repudiates a contract, the other party may then elect to either (1) accept the repudiation and bring a suit to recover damages for its breach; or (2) treat the repudiation as inoperative and sue for damages as they accrue when the time for performance under the contract is due. *See Pollack v. Pollack*, 39 S.W.2d 853, 857 (Tex.1931)(noting measure of damages where suit is based on anticipatory breach);

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[6] We note the trial court did submit a defensive issue as to whether AFC's performance was excused by Samaras' repudiation.

Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 79 S.W. 1069, 1071 (1904)(holding that upon repudiation of a contract by one party, the other party must make his choice between the two available courses); *Thomas v. Thomas*, 902 S.W.2d 621, 624 (Tex.App.--Austin 1995, writ denied)(holding anticipatory repudiation and breach of contract to be inconsistent rights); *Lufkin Nursing Home, Inc. v. Colonial Inv. Corp.*, 491 S.W.2d 459, 463 (Tex.Civ.App.--Amarillo 1973, no writ)(holding that filing of suit after time for performance constitutes election to hold repudiating party responsible for consequences of nonperformance). Since the time for performance had passed in the instant case, Samaras clearly was entitled to sue for breach of contract and to elect to have the issue submitted to the jury as an express breach or failure to comply. AFC, on the other hand, was not entitled to dictate the remedy Samaras sought to pursue. *See King v. Lindley*, 697 S.W.2d 749, 751 (Tex.App.--Corpus Christi 1985, writ ref'd n.r.e.) (defendant may not dictate remedy plaintiff pursues). Therefore, the trial court did not abuse its discretion in refusing to submit anticipatory breach as the controlling issue.

c. Condition Precedent

Samaras pled in his petition that at all times he stood ready, willing and able to perform his obligations under the agreement and that he had complied with all conditions precedent. Having plead such performance, Samaras was only required to prove that he had complied with such conditions precedent as AFC specifically denied. TEX. R. CIV. P. 54. AFC asserted in its amended answer that Samaras "never tendered his performance which was a condition precedent, or alternatively, a covenant necessary before [AFC] was

obligated to perform."

In its fourth point of error, AFC contends the trial court erred in refusing to submit a question asking whether Samaras failed to comply with a condition precedent to the alleged agreement.[7]

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[7] AFC presented three different questions regarding condition precedent. The first request read as follows:

Jury Question No. 1

Instruction

You are instructed that on June 15, 1988, George Samaras and Al Copeland Enterprises, Inc., agreed that Al Copeland Enterprises, Inc. would provide two build-to-suit restaurants (land and building) with franchise fees waived to George Samaras conditioned upon the following:

A. Submission of mutually acceptable sites by George Samaras;

B. Arms length negotiations between George Samaras and Al Copeland Enterprises to arrive at terms that would pay back the costs of acquisition and construction together with a reasonable rate of return to Al Copeland Enterprises, Inc.; and,

C. George Samaras' signing of Standard Franchise Agreements binding him to all standard franchise obligations except payment of franchise fees for the two restaurants.

Jury Question

Do you find from a preponderance of the evidence that George

Samaras performed all of the conditions as set forth above?

The first alternative requested issue read as follows:

Alternative Jury Question No. 1

Instruction

Do you find from a preponderance of the evidence that on or about June 15, 1988, George Samaras and Al Copeland Enterprises, Inc. agreed that Al Copeland Enterprises, Inc. would provide two build-to-suit restaurants (land and building) with franchise fees waived conditioned upon the following:

A. Submission of mutually acceptable sites by George Samaras:

Answer:

B. Arms length negotiations between George Samaras and Al Copeland Enterprises to arrive at terms that would pay back the costs of acquisition and construction together with a reasonable rate of return to Al Copeland Enterprises, Inc.; and

Answer:

C. George Samaras' signing of Standard Franchise Agreements binding him to all standard franchise obligations except payment of franchise fees for the two restaurants.

Answer:

Alternative Jury Question No. 2

Do you find from a preponderance of the evidence that George

In order to address this issue, we must first determine whether Samaras' tender of performance was a "condition precedent," as alleged by AFC.

A condition precedent is either a condition to the initial formation of a contract or a condition to an obligation to perform an existing agreement. *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex.1976); *see also Graco Robotics, Inc. v. Oaklawn Bank*, 914 S.W.2d 633, 640 n. 2 (Tex.App.--Texarkana 1995, writ dism'd); *but see Rincones v. Windberg*, 705 S.W.2d 846, 848 (Tex.App.--

---

Samaras performed all of the conditions precedent in Special Issue No. ___?

The second alternative requested jury issue read as follows:

Alternative Jury Question No. 3

Instruction

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. A condition precedent may relate to either the formation of a contract or to liability under them. Conditions precedent to an obligation to perform are acts or events that are to occur after the contract is made and that must occur before there can be a right to immediate performance and before there can be a breach of contractual duty.

Jury Question No. 3

Do you find from a preponderance of evidence, that the Plaintiff performed all conditions precedent to the contract with ACE?

Austin 1986, no writ)(holding condition to obligation to perform was a condition subsequent). In the instant case, AFC's pleading contends that AFC's obligation to perform under the letter agreement, specifically its obligation to provide Samaras with the build-to-suit restaurants, was conditioned upon Samaras' tender of performance. AFC did not plead nor contend that the tender of performance was a condition precedent to the initial formation of the agreement.

In its proposed jury questions, AFC set forth three conditions that it contended Samaras would have been required to meet before AFC's obligation to perform would arise. These three conditions were: (1) the submission of mutually acceptable sites by Samaras; (2) arms-length negotiations between Samaras and AFC to arrive at terms that would pay back the costs of acquisition and construction together with a reasonable rate of return; and (3) execution of a Standard Franchise Agreement binding Samaras to all standard franchise obligations except payment of franchise fees.

With regard to the first alleged condition precedent, Jim Flynn testified at trial that the company had a concurrent obligation in designating sites to provide the assistance of its real estate representatives. Therefore, in order to designate the sites, the company would have had to cooperate with Samaras. AFC's second alleged condition precedent negotiations between AFC and Samaras, would also require AFC's concurrent cooperation. Finally, AFC would have to produce the Standard Franchise Agreement before Samaras could be called upon to execute it.

Conditions are disfavored in the law, and where a condition would impose an absurd or impossible result, the agreement is to be interpreted as creating a covenant rather than imposing a condition. *Hohenberg Bros. Co.*, 537 S.W.2d at 3. In light of the concurrent obligations of both AFC and Samaras with respect to each of the alleged conditions precedent, we conclude the alleged conditions were actually covenants to be performed during the course of fulfilling the build-to-suit obligation. Therefore, the trial court did not abuse its discretion in refusing to submit the requested issue as to condition precedent.[8]

d. Instruction Regarding Intended Meaning of Contractual Language

In its fifth point of error, AFC argues that since there was no ambiguity pled, the trial court erred in submitting the following instruction with the failure to comply jury question:

> In answering this question, consider what the parties, at the time of the agreement, intended the words "The company will provide you with two build-to-suit restaurants (land and building)" to mean. In determining the intended meaning of those words, consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, the

---

[8] We note the trial court did submit AFC's requested issue regarding repudiation which would encompass any alleged failure by Samaras to perform the covenants.

> parties' conduct, and the custom and usage of the industry.

The submitted instruction is patterned from 4 TEX. PATTERN JURY CHARGES § 101.08 (1990 & Supp.1992-93) ("PJC"). PJC § 101.08 is intended to be used as an instruction where the court determines the agreement contains an ambiguous provision. PJC § 101.08, comment. The submission of the instruction in the instant case confuses the issues of ambiguity and indefiniteness. "Ambiguity results when the intention of the parties is expressed in language susceptible of more than one meaning, but when a contract is silent, the question is not one of interpreting the language but rather one of determining its effect." *Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d at 822. As previously noted, a jury may not be called upon to construe the legal effect of an agreement. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d at 814.

AFC is correct in contending that ambiguity was not pled in the instant case. Rather, the issue as to the contractual language was whether it was sufficiently definite to be enforceable which we have held to be a question of law. Therefore, the instruction submitted in connection with the failure to comply question was not necessary since the trial court was called upon to determine the legal effect of the contractual language as a matter of law. The submission of a question of law to a jury, however, is not considered harmful error unless extraneous prejudice is shown. *Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d at 826. The jury must have decided the language was sufficiently definite to enable the jury to determine that AFC had failed to comply with its obligations arising thereunder. Since we have

determined that the contract was sufficiently definite, the jury's application of the instruction to the submitted issue was consistent with the court's resolution of the issue, and no extraneous prejudice can be shown. *See id.*

3. Damage Findings

In its sixth and seventh points of error, AFC contends the evidence was legally and factually insufficient to support the jury's actual damage award. Specifically, AFC argues the evidence was not sufficiently certain and non-speculative to support the lost profits and residual value amounts. In addition, AFC contends the evidence did not support a finding that the damages sought resulted from the breach alleged by Samaras.

In considering a "no evidence" or legal sufficiency point, we consider only the evidence favorable to the decision of the trier of fact and disregard all evidence and inferences to the contrary. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326-27 (Tex.1993); *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex.1992). Under this test, there must be some evidence to support the jury finding, either directly or inferentially. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d at 327. If there is more than a scintilla of evidence to support the finding, the no evidence challenge must fail. *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex.1987). Evidence that a reviewing court may have discounted if serving as a jury cannot be judicially erased from the record. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex.1993).

In considering a factual sufficiency point, we are required to review all of the evidence; however, we may not

pass on the credibility of the witnesses or the weight given their testimony, and we may not interfere with the jury's resolution of conflicts in the evidence. *Lawson-Avila Constr., Inc. v. Stoutamire*, 791 S.W.2d 584, 594 (Tex.App.--San Antonio 1990, writ denied). Where conflicting evidence is presented, we are not called upon to reweigh the evidence; thus, the jury's verdict on such matters is generally considered to be conclusive. *Sanchez v. Guerrero*, 885 S.W.2d 487, 491 (Tex.App.--El Paso 1994, no writ); *see also* William Powers, Jr. & Jack Ratliff, Another Look at "No Evidence" and "Insufficient Evidence," 69 TEX. L. REV. 515, 525-526 (1991). We will uphold the jury's finding so long as the evidence supporting that finding is not so weak as to make the finding clearly wrong or manifestly unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986).

Loss of profits damages need only be proven with reasonable certainty, and the rule regarding such proof is intended to be flexible so as to accommodate the various circumstances in which claims for lost profits arise. *Texas Instruments, Inc. v. Teletron Energy Management, Inc.*, 877 S.W.2d 276, 279 (Tex.1994). "What constitutes reasonably certain evidence of lost profits is a fact intensive determination." *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex.1992). Where estimates are based on objective facts or data and there are firm reasons to expect a business to yield a profit, recovery is not prohibited simply because the enterprise is new. *See Texas Instruments, Inc.*, 877 S.W.2d at 280; *Holt Atherton Indus., Inc.*, 835 S.W.2d at 84. It is the activity that is the enterprise, and if the activity is well-established, the fact that a newly formed entity is engaging in the activity will not preclude recovery. *Texas Instruments, Inc.*, 877 S.W.2d at 280.

Each of the parties presented expert testimony as to the amount of profits Samaras could have made over a twenty year period and the residual value of the restaurants. The damage model presented by Samaras' expert took into account the historical operations of Popeye's franchises, the potential for failure of a new franchise and the factors upon which he based his evaluation of the likelihood of Samaras' success, including Samaras' experience in the industry. The historical data on the franchise operations provided an intelligent objective basis for Samaras' damage model, and we find the testimony of Samaras' expert provided more than a scintilla of evidence to support the jury's damage award.

Each side questioned certain assumptions made in the other party's damage model. The jury was free to weigh this evidence in light of the various issues raised as to each party's model. The jury did not unquestioningly accept the testimony of Samaras' expert but reduced the amount of damages presumably based on certain challenges made by AFC to the expert's model. We are not called upon to reweigh the evidence, and we do not find that the evidence supporting the jury's finding is so weak as to make the finding clearly wrong or manifestly unjust. The requirement of "reasonable certainty" was met, and the damage model and testimony are based on evidence showing a firm reason to expect Samaras would have profited in the franchise activity.

With respect to AFC's seventh point of error, AFC asserts that the amount of damages awarded by the jury presumes AFC breached its obligation to provide Samaras with rights under two franchise agreements, but AFC argues there is no evidence of any demand for these rights separate from the demand for the build-to-suit restaurants. AFC's

argument ignores, however, that the franchise agreements were to be used in conjunction with the build-to-suit restaurants not independently. This was the fundamental agreement of the parties as reflected in paragraph C of the letter. We conclude that AFC's argument is without merit.

4. Attorney's Fees and Post-Judgment Interest

In its eighth and ninth points of error, AFC raises two challenges to the award of attorneys' fees and post-judgment interest. In its ninth point of error, AFC contends that if we set aside the award of actual damages, the attorney's fees and post-judgment interest awards also must be set aside. Since we have overruled AFC's contentions with respect to the actual damage award, AFC's ninth point of error is also overruled.

AFC's eighth point of error raises an issue as to whether Samaras is precluded from recovering attorney's fees and post-judgment interest under applicable bankruptcy law. The issue presented is whether the claim for attorney's fees and post-judgment interest contained in the trial court's judgment should be allowed or disallowed under the bankruptcy laws. The trial court refused to rule on the issue questioning its authority to decide the issue under bankruptcy law. AFC, however, argues that the bankruptcy court gave the trial court the jurisdiction to decide the issue. We disagree.

Each of the code sections and cases cited by both parties address the allowance and disallowance of such claims in bankruptcy. The allowance and disallowance of a bankruptcy claim is considered a core proceeding under federal bankruptcy law, and the bankruptcy court retains

exclusive jurisdiction over such claims. *In re Wood*, 825 F.2d 90, 97 & n. 35 (5th Cir.1987); *Warren v. Calania Corp.*, 178 B.R. 279, 281 (M.D.Fla.1995). Although the validity of a bankruptcy claim may be determined by a state court and a bankruptcy court may allow a state court to proceed to judgment in order to liquidate a claim, the allowance or disallowance of the claim after liquidation is within the bankruptcy court's exclusive jurisdiction. *In re Ford*, 967 F.2d 1047, 1050 (5th Cir.1992); *In re Comstock Financial Services, Inc.*, 111 B.R. 849, 859 (Bankr.C.D.Cal.1990). Exclusive jurisdiction rests in the bankruptcy court because it retains exclusive *in rem* jurisdiction over the property of the bankruptcy estate, and only the bankruptcy court can ensure the equitable distribution of the estate to all the estate's creditors by consistently determining which claims are to be allowed and disallowed. *In re Comstock Financial Services, Inc.*, 111 B.R. 849, 859 (C.D.Cal.1990).

Therefore, we agree with the trial court that it did not have the jurisdiction to rule on the issue of whether federal bankruptcy law disallows the recovery of attorney's fees and post-judgment interest. AFC's ninth point of error is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
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Opinion and Judgment of the Court of Appeals of Texas (4th District) with Orders Denying Rehearing and Review

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RE: Court of Appeals Number: 04-95-00501-CV
Trial Court Case Number: 90-CI-12735

Style: America's Favorite Chicken Company
v.
George Samaras

Dear Counsel:

After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,
HERB SCHAEFER, CLERK

/s/_____
JOYCE WIATREK, DEPUTY CLERK

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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June 12, 1997

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RE: Case Number 96-1029
Style: AMERICA'S FAVORITE CHICKEN COMPANY, f/k/a AL COPELAND ENTERPRISES, INC.
v.
GEORGE SAMARAS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by /s/_____
Michael Kopp, Deputy

Supreme Court, U.S.
FILED

981116 JAN 11 1999

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

In Re:
Al Copeland Enterprises, Inc.,
Debtor

George Samaras,
Petitioner,

v.

AFC Enterprises, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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2PP

Opinion and Judgment of the Court of Appeals of Texas (4th District) with Orders Denying Rehearing and Review

TO THE 166TH DISTRICT COURT OF BEXAR COUNTY, GREETINGS:

Before our Court of Appeals for the Fourth District of Texas, on the 4th day of September A.D. 1996, the cause upon appeal to revise or reverse your judgment between

America's Favorite Chicken Company

No. 04-95-00501-CV and Tr. Ct. No. 90-CI-12735

George Samaras

was determined; and therein our said Court made its order in these words:

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee George Samaras recover his costs of this appeal from appellant America's Favorite Chicken Company and from Westchester Fire Insurance Company as surety on appellant's cost bond.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Appeals for the Fourth District of Texas, in this behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the Hon. Phil Hardberger, Chief Justice of our Court of Appeals, with the Seal thereof affixed, at the City of San Antonio, this the 5th day of September, 1997.

I hereby certify that to the best of my knowledge the following are true and correct costs in this Cause.

Herb Schaefer, Clerk
/s/_____
Cynthia A. Martinez, Deputy

Ct/Appeal	55.00
Transcript	1179.00
State/Facts(1)	Unknown
State/Facts (2)	5922.00

Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

No. 98-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE:
AL COPELAND ENTERPRISES, INC.,

Debtor.

GEORGE SAMARAS,

Petitioner,

v.

AFC ENTERPRISES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a bankruptcy court sends a claim to state court to be decided under both state law and federal bankruptcy law, and when the state court decides the state law issues but expressly refuses to exercise jurisdiction over the federal bankruptcy law issues, is the bankruptcy court permitted by its previous orders, by abstention law, or by FED. R. CIV. P. 60(b)(6) to reclaim jurisdiction over and decide the unresolved federal bankruptcy law issues?

DISCLOSURE PURSUANT TO RULE 29.6

The petition for writ of certiorari accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The critical facts and procedural background are undisputed and are accurately set forth in the opinion of the court of appeals. *Samaras v. America's Favorite Chicken Company Incorporated (In re Al Copeland Enterprises, Inc.)*, 153 F.3d 268 (5th Cir. 1998). In contrast, petitioner's statement of the case omits or obscures four indisputable facts:

- The bankruptcy court ordered the entire case sent to the state courts to decide state law issues and to exercise concurrent jurisdiction to decide bankruptcy allowance issues.

- The state courts did not decide the bankruptcy allowance issues because they determined that only the bankruptcy court had the jurisdiction to do so.

- Petitioner therefore received a judgment containing items of compensation that are plainly disallowed under federal bankruptcy law.

- The bankruptcy court was the only one left to accept the state courts' jurisdictional invitation to decide the bankruptcy allowance issues.

In light of these critical facts, the rulings of the courts below were not just correct, but were an eminently sensible response to a procedural morass that was not of respondent's making and is not likely to recur in a future case.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Rather than adjudicate petitioner's claims itself, the bankruptcy court in April 1993 sent those claims to state court where they were to be "liquidated" – *i.e.*, decided for "all purposes," thus resolving both state law issues and "bankruptcy allowance issues." (2 R 228-29, 282-84, 286-87)[1] Although the state courts did decide the state law issues in the case, they held they lacked jurisdiction to decide the bankruptcy law issues concerning the allowability of post-petition attorney's fees, interest, and costs. The judgment therefore included items that even petitioner tacitly concedes were unrecoverable under federal bankruptcy law. The bankruptcy court's August 1997 decision to reclaim jurisdiction over the unresolved federal law issues and disallow post-petition attorney's fees, interest, and costs was correct – and it was properly affirmed by the district court and the court of appeals.

Contrary to petitioner's contention, the decisions of the courts below do not conflict with the Constitution or any case or statute, and they do not present for review any issue of the kind reflected in Supreme Court Rule 10. This is merely a commercial dispute between two private litigants, and the courts below applied settled legal precedent to an unusual procedural setting that is not likely to recur. Petitioner's effort to divine a circuit conflict is contrived and erroneous, because it fails to distinguish between cases in which the state courts actually decided

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[1] Citations are to the volume of the record on appeal to the Fifth Circuit followed by the page number in that volume.

the federal law issues sent to them by abstaining federal courts and cases in which the state courts refused to decide those issues on jurisdictional grounds.

Petitioner's first argument concerning "full faith and credit" is without merit – both because it was not preserved in the courts below and because it does not apply to a situation, as here, in which state courts refused to decide federal law issues sent to them by the abstaining bankruptcy court. Petitioner's second argument – that the bankruptcy court did not "retain jurisdiction" to decide the unresolved federal law issues – is also without merit, because the bankruptcy court's prior orders and the plan of reorganization empowered it to reclaim jurisdiction over and decide the unresolved federal issues. This procedure finds further support in the law of abstention, which permits litigants to return to the abstaining federal court for the resolution of federal law claims that the state court failed or refused to decide. Finally, contrary to petitioner's third argument, the bankruptcy court had broad equitable powers under FED. R. CIV. P. 60(b)(6) to grant respondent relief from a situation it did not cause and could not have anticipated – namely, having a clearly established right under federal bankruptcy law with no state court willing to adjudicate and enforce that right.

ARGUMENT

I. The Decisions Of The Courts Below Are Correct.

As the bankruptcy court correctly held on at least two occasions in this case, federal bankruptcy law

precludes a claimant from recovering post-petition attorney's fees, interest, and costs. (2 R 265, 277-78, 341-42) Although petitioner has not contended otherwise, he nonetheless claims entitlement to these very items in an amount that now exceeds $1 million. That he can assert this claim in the face of prohibitive bankruptcy law is a function of two procedural twists in this case – the bankruptcy court's orders returning the case to state court to be determined "for all purposes," and the state appellate courts' binding conclusion that they lacked any jurisdiction to decide the bankruptcy allowance issues. Because this conclusion placed respondent in a judicial netherworld, where it had a perfectly meritorious argument that no court would address on the merits, it requested the bankruptcy court to reclaim jurisdiction over the case and decide the bankruptcy law issues that the state courts concluded they lacked jurisdiction to resolve. The bankruptcy court's decision to grant this request was properly affirmed by the district court and court of appeals, because that ruling was compelled by the bankruptcy court's prior orders, supported by the law of abstention, and permitted by the equitable powers conferred under Rule 60(b)(6).

Under the plain language of the bankruptcy court's April 1993 order, petitioner's claim was not to be "deemed allowed" under section 5.02 of the plan of reorganization unless and until it was "liquidated" to a final, unappealable judgment in state court. (2 R 224-25) As defined by the bankruptcy court in the September 1995 hearing and the October 1995 order, a "liquidated" claim is one that the state court had decided for "all purposes,"

thus resolving both state law issues and federal "bankruptcy allowance issues." (2 R 228-29, 282-84, 286-87) Accordingly, if the state court were to fail or refuse to decide whether a claimed item is allowable under federal bankruptcy law, as occurred here with respect to attorney's fees, interest, and costs, then it cannot be said that the claim as to those items had been "liquidated" so as to be "deemed allowed" under the plan.

Given the state appellate courts' now-binding view that only the bankruptcy court had jurisdiction to decide bankruptcy allowance issues, it was necessary and appropriate for the bankruptcy court to reclaim jurisdiction over the case, finish the task of liquidation that the state courts refused to undertake, and hold that post-petition attorney's fees, interest, and costs are disallowed under federal bankruptcy law. This result was necessary to avoid whipsawing respondent with a nonsensical reading of the April 1993 order.[2] Thus, if the state court had

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[2] As the bankruptcy court reasoned at the September 6, 1995 hearing:

> But I do think that [the state] court is a court acting not simply to apply state law, but it is there to apply the bankruptcy law with regard to liquidation of the claim. Otherwise, the order doesn't make sense. Because if it was – neither one of you can have it both ways. [Petitioner's counsel] can't have it that that's just a state court and it's just going to apply the state law and you're forever precluded from the bankruptcy part of it, and likewise [respondent's counsel] can't have it his way and say, "Well, but we've always got you back over here to apply the overlay of the Bankruptcy Code on this state law claim, regardless of what the state court says,"

[*continued*]

actually decided (erroneously) that federal bankruptcy law allows claims of post-petition attorney's fees, interest, and costs, respondent could not seek relief from the bankruptcy court. But by the same token, when the state court wholly refused to consider bankruptcy law because it concluded that it lacked any jurisdiction to do so, petitioner cannot be heard to argue that respondent is "forever precluded from the bankruptcy part of it." (2 R 282) The bankruptcy court was the only one left to apply controlling bankruptcy law, and the court of appeals correctly agreed with the bankruptcy court that it was "required to decide the issue." (2 R 342).

Because the April 1993 and October 1995 orders had the effect of an abstention (*see* 2 R 280), federal abstention cases provide guidance in determining whether a party may return to the abstaining federal court to present issues that the state court failed or refused to decide. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court held that when abstention is ordered and "a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, *and has them decided there*, then . . . he has elected to forego his right to return to the District Court." *Id.* at 419 (emphasis added). But the converse is also true: if a party submits and litigates federal claims in a case sent to state court, and the state court does *not*

[*Note 2 continued*]
because what you both said was, "We're going to state court to liquidate this claim." And in parenthesis I'm putting "for all purposes."

(2 R 282)

decide those claims, then the party may return to the abstaining federal court to present those claims and have them resolved. Lower federal courts have consistently followed this reasoning. *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, Virginia*, 135 F.3d 275, 283-84 & n.4 (4th Cir. 1998) (deciding federal claims following abstention to state court because they "were not 'fully litigated,' as *England* requires, . . . since the state circuit court refused to address them."); *Silverman v. Browning*, 414 F. Supp. 80, 85 (D. Conn.), *aff'd*, 429 U.S. 876 (1976) ("in light of the state court's actions in not passing upon the constitutional issues, the plaintiff is not foreclosed from returning to this Court for the presentation of the federal issues for final review.").

The circumstances justifying the bankruptcy court's decision here to adjudicate the bankruptcy law issues are even more compelling than in *Silverman* and *Front Royal*. Unlike *Silverman*, where the state supreme court applied a waiver bar, the state appeals court here refused to adjudicate the issues at all because it concluded that only the bankruptcy court had jurisdiction to decide questions involving bankruptcy allowance. And unlike *Front Royal*, where the United States court of appeals observed that the plaintiff had "perfunctorily performed its duty to return to the state court" and "flout[ed] our very purpose in ordering abstention in the first place," 135 F.3d at 282, respondent here dutifully litigated all state and federal issues through the state courts – only to be met by the state courts' unexpected decision, completely at odds with the bankruptcy court's directive, that they had no jurisdiction to decide the bankruptcy issues. Accordingly, the bankruptcy court was correct in finishing the state

courts' job of liquidation and disallowing the claims for post-petition attorney's fees, interest, and costs pursuant to federal bankruptcy law.

Finally, even if the bankruptcy court's orders and the law of abstention did not permit the retaking of jurisdiction over the federal law claims, the Fifth Circuit was correct in construing Rule 60(b)(6) to support such an action. Rule 60(b)(6), made applicable to bankruptcy proceedings by FED. R. BANKR. P. 9024, stands as a "grand reservoir of equitable power" to relieve a party from the inequitable effects of a final order. *Harrell v. DSC Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992). As the court of appeals correctly held, the bankruptcy court had "ample justification" under this rule for affording respondent relief from any unintended effects of its prior orders: no one could have anticipated that the state courts would refuse to consider the federal law issues; when respondent was first alerted to such a possibility, it returned to bankruptcy court to clarify that it should raise the issue in the state appellate court; it pursued relief all the way from the trial court to the Texas Supreme Court; and it sought Rule 60(b)(6) relief only after every state court refused to consider the federal law issues. Based on these compelling facts, the court below correctly decided that it "would be inequitable" to deny respondent "a federal determination of the allowability of the fees, costs, and interest portion of [petitioner's] claim." 153 F.3d at 272.

II. Petitioner's Attacks On The Decisions Below Are Without Merit.

Petitioner makes three separate but overlapping arguments, all calculated to suggest that the courts below

condoned an impermissible assault on a state court judgment. Petitioner's first argument, however, has not been preserved; his second incorrectly construes the bankruptcy court's orders and the law of abstention; and his third finds no support in law or logic. But most importantly, none of the arguments presents for review any issue of the kind reflected in Supreme Court Rule 10.

A. Petitioner's full faith and credit argument has been waived and, in any event, does not apply here.

Petitioner chides the court of appeals for "not address[ing] the application of the Full Faith and Credit Statute, 28 U.S.C. § 1738." (Petition at 11) Petitioner, however, did not raise this argument in the bankruptcy court or the district court, and asserted it in the court of appeals for the first time in his petition for rehearing. This was insufficient to preserve the issue in the Fifth Circuit, which follows the well-settled practice that issues raised for the first time in a petition for rehearing will not be considered. *Dean v. Dean*, 837 F.2d 1267, 1268 (5th Cir. 1988) (citing cases); *United States v. Bigler*, 817 F.2d 1139, 1140 & n.3 (5th Cir.) (on rehearing), *cert. denied*, 484 U.S. 842 (1987). Having failed to timely raise his full faith and credit argument in the courts below, petitioner may not now assert it in this Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990).

But even if the issue were preserved for review, the full faith and credit statute did not preclude the bankruptcy court from deciding federal law issues that the state courts determined they lacked jurisdiction to

address. Under the full faith and credit statute, as well as the related *Rooker-Feldman* doctrine to which petitioner also alludes,[3] a federal court cannot sit in appellate review of a state court's decision without, at the very least, determining what effect the state would give its own judgment. Thus, as the cases cited by petitioner illustrate, a bankruptcy court could not have reviewed a state court's determination that federal bankruptcy law does allow awards of post-petition attorney's fees, interest, and costs – even though such a ruling would have been erroneous. *Reitnauer v. Texas Exotic Feline Foundation, Inc. (In re Reitnauer)*, 152 F.3d 341, 344 (5th Cir. 1998); *Sanders v. City of Brady (In re Brady, Texas, Municipal Gas Corp.)*, 936 F.2d 212, 219 (5th Cir. 1991).

In contrast, no such second-guessing occurred in this case. Rather than rule on the merits, the state courts refused to even address the bankruptcy allowance issues because they concluded that only bankruptcy courts have jurisdiction to decide such questions. And rather than review or disagree with this jurisdictional determination or any other ruling of the state courts, the bankruptcy court instead merely accepted the state courts' invitation to exercise its jurisdiction and decide the unresolved bankruptcy allowance issues. Nothing about the full faith and credit statute prohibits a federal court from deciding federal law issues left unresolved by the state courts to

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[3] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (federal district courts do not have the authority to review state court judgments); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (jurisdiction of the federal district court is strictly original).

which the claim was sent – and petitioner cites no case that holds to the contrary. *Cf. Front Royal*, 135 F.3d at 284 ("There appear to be no cases in which a Court of Appeals has denied a litigant the right to return to federal court where federal claims remained after a *Burford* abstention. . . . ").

In an effort to obscure the critical distinction between a state court that decides the merits of a federal law issue and one that refuses to decide the issue on jurisdictional grounds, petitioner asserts that the state appellate court's judgment or mandate, and not its opinion, "is the sole point of reference to determine what claims or issues have been resolved." (Petition at 12) Even in the context of res judicata, which petitioner tries to invoke, his argument is wrong. As both federal and state courts recognize, "[t]he res judicata effect of a prior judgment is an issue of law that depends upon an interpretation of the court's *opinion*." *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 888 (5th Cir. 1993) (emphasis added), *cert. denied*, 511 U.S. 1032 (1994); *Hudspeth v. Hudspeth*, 673 S.W.2d 248, 251 (Tex. App. – San Antonio 1984, writ ref'd n.r.e.) (in determining applicability of res judicata, "[j]udgments, like other written instruments, are to be construed as a whole toward the end of harmonizing and giving effect to all the court has written," including "its findings and recitals.").

In any event, this case does not turn on res judicata; it turns on whether the state courts effectuated the bankruptcy court's 1993 and 1995 orders by exercising their concurrent jurisdiction to determine allowability under federal bankruptcy law. The only way to know whether

the state courts in fact did so is to look to their substantive opinion, not just to their formal judgment or mandate. Here, it is undisputed that the state courts did not exercise jurisdiction to decide the bankruptcy law issues, and petitioner offers no authority that would have required the bankruptcy court to blind itself to that fact. *Cf. Front Royal*, 135 F.3d at 283-84 (in determining whether state court litigant is entitled to return to abstaining federal court to raise federal issues, court looks to state court's opinion and letter ruling to confirm that federal issue was not decided); *Kohn v. Leavitt-Berner Tanning Corp.*, 157 B.R. 523, 526-27 (N.D.N.Y. 1993) (full faith and credit statute does not prohibit bankruptcy court from looking behind a state court judgment to ascertain the relationship between the parties and the portion of the judgment that is allowable under bankruptcy law).

Finally, there is no merit to petitioner's related argument that a "refusal of the state court to apply bankruptcy law is no different from applying it erroneously." (Petition at 21) To the contrary, there is a complete difference between a disposition on jurisdictional grounds and a disposition on the merits. A court's determination that it lacks jurisdiction to decide an issue has none of the force of a ruling on the merits; it does not, for example, constitute res judicata as to the merits and it does not bar a party from bringing the same claim in a court having jurisdiction. *Cowgill v. White*, 543 S.W.2d 437, 440 (Tex. Civ. App. – Corpus Christi 1976, writ ref'd n.r.e.); *Silverman v. Browning*, 414 F. Supp. at 84. By the same token, the state courts' determination here that they lacked jurisdiction to resolve the merits of the bankruptcy allowance

issues gave the bankruptcy court the right – indeed, the obligation – to decide those issues on the merits.

B. The bankruptcy court's orders, the plan of reorganization, and the law of abstention permitted the bankruptcy court to reclaim jurisdiction over the unresolved federal law issues.

In his second argument, petitioner asserts that neither the bankruptcy court's orders and plan of reorganization, nor the abstention cases cited by the courts below, permitted the court to reclaim jurisdiction over the unresolved federal law issues. By analyzing in detail the particular bankruptcy court orders at issue (Petition at 14-17), petitioner only underscores that this is a fact-specific case not sufficiently important or far-reaching to justify this Court's review. Moreover, petitioner misconstrues the meaning of the orders and plan, and he fails to offer any meaningful distinction between this case and the abstention decisions cited by the courts below.

Attempting to draw a distinction between the concepts of "liquidation" and "administration," petitioner first argues that the bankruptcy court "ceded jurisdiction" over the former to the state courts and, under the April 1993 order and the plan of reorganization, retained jurisdiction only over the latter. (Petition at 13-17) This argument wholly ignores how the bankruptcy court defined the term "liquidation" in 1995, when respondent sought clarification of what issues it was required to raise in the state appellate courts. As the bankruptcy court made clear at that time, a "disputed claim" (as those words are used in the plan) would not be "liquidated" so

as to be "deemed allowed" (as those words are used in the April 1993 order) unless and until the state courts both decided state law issues and exercised their concurrent jurisdiction to decide the bankruptcy allowance issues. (2 R 228, 282-83, 286-87) Because the state courts indisputably refused to exercise jurisdiction over and decide the bankruptcy allowance issues, petitioner's claims were not fully "liquidated" within the meaning of the bankruptcy court's orders. Under those orders and the retention-of-jurisdiction clause in the plan of reorganization, the bankruptcy court therefore had jurisdiction to finish the task of liquidation that the state courts only partially completed. To hold otherwise would have left respondent in the intolerable state of having a perfectly meritorious federal law argument – but with no court willing to address it.

Petitioner fares no better in attempting to distinguish *Silverman* and *Front Royal*, the analogous abstention cases cited by the Fifth Circuit. In an effort to confine those cases to their precise facts, petitioner argues that they are distinguishable because the abstentions were forced upon the litigants and because the abstaining federal courts specifically retained jurisdiction in their initial abstention orders. (Petition at 18-20) These are distinctions without a difference, for the decisions of the *Silverman* and *Front Royal* courts to adjudicate the unresolved federal issues did not turn on the presence of a "retention of jurisdiction" clause in the abstention orders or on the happenstance that the litigants did not volunteer for the abstention. Rather, the willingness of both courts to reclaim jurisdiction over the unresolved federal issues

turned on the Court's strongly-held policy – also followed by the Fifth Circuit below – that litigants affected by abstention should "not be exposed . . . to procedural traps operating to deprive them of their right to a District Court determination of their federal claims." *England*, 375 U.S. at 418. Given the refusal of the state courts here to exercise jurisdiction over respondent's bankruptcy allowance issues, and given the importance of federal bankruptcy law to the equitable distribution of a debtor's assets, the courts below were correct in drawing guidance from *England*, *Front Royal*, and *Silverman* and refusing to deprive respondent of its right to a determination of the unresolved federal law issues in the case.[4]

C. The bankruptcy court had broad equitable powers to grant respondent relief.

In a final variant of his unpreserved full faith and credit argument, petitioner asserts that Rule 60(b)(6) was

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[4] Relying on a case cited in *England*, petitioner also argues that respondent "should have filed a petition for writ of certiorari in the United States Supreme Court to correct the erroneous holding of the Texas Court of Appeals." (Petition at 21, citing *NAACP v. Button*, 371 U.S. 415 (1963)). This argument is wrong. Neither *Button* nor *England* holds that a party in the position of respondent is *required* to petition this Court as its exclusive avenue of redress – particularly when the state court has not even decided the federal law issue. Rather, as *England*, *Button*, and *Silverman* make clear, a party like respondent may elect between petitioning for certiorari or returning to the abstaining federal court. Moreover, the issues that would have been presented in a certiorari petition were mooted before the time for a petition expired by the bankruptcy court's decision to address and resolve respondent's bankruptcy law issues.

impermissibly used "to mount a collateral attack on a state court judgment," to "substitute for direct appeal," and to "re-examine" issues determined by the judgment. (Petition at 21, 23) This argument misapprehends the purpose for which Rule 60(b)(6) was invoked, and again ignores the critical fact that the state court refused to reach the federal issues.

Underlying petitioner's argument is the notion that Rule 60(b)(6) was invoked to somehow strip him of an alleged "property right" in the state court judgment. Nothing could be less so. Respondent invoked Rule 60(b)(6) not as a means to obtain relief from the state court judgment but rather to obtain relief from the April 1993 order, if it were somehow interpreted to prohibit the bankruptcy court from doing anything but the ministerial act of applying the reorganization plan's 15% discount to the amount of the state court judgment. Even if the 1993 order could be read in such a fashion, Rule 60(b)(6) provided an appropriate means by which the bankruptcy court could decide the unresolved federal issues.

To be sure, the effect of invoking Rule 60(b)(6) in this manner was to enable the bankruptcy court to disallow the state courts' awards of post-petition attorney's fees, interest, and costs. That does not mean, however, that Rule 60(b)(6) was used as a "collateral attack," a "substitute for appeal," or a way to "re-examine" issues determined by the state court judgment. It has long been established that a bankruptcy court has broad equitable powers to look behind a state court judgment to determine the allowability under federal bankruptcy law of the components of that judgment – unless the state court

did decide the allowability issues. *Pepper v. Litton*, 308 U.S. 295, 304-06 (1939); *In re Bus Stop, Inc.*, 3 B.R. 26, 27 (Bankr. S.D. Fla. 1980). Because the state courts here did not decide these bankruptcy allowability issues, the bankruptcy court was empowered to reclaim jurisdiction over and decide those issues.[5]

Petitioner's final contention that "the state courts did have jurisdiction to determine the federal law claims" (Petition at 24) only proves the appropriateness of Rule 60(b)(6) relief, given the refusal of the state courts to exercise that jurisdiction. Indeed, if the state courts had jurisdiction to decide the bankruptcy allowance issues but flouted the exercise of that jurisdiction, then it would have been egregiously inequitable to saddle respondent with this erroneous but binding ruling and use the April 1993 order as a sword to prevent even the bankruptcy court from resolving the bankruptcy allowance issues.

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[5] Contrary to petitioner's characterization, *Pepper v. Litton* accords bankruptcy courts a far broader equitable power to scrutinize state court judgments than merely the power "to determine whether [the judgment] was void for want of subject matter jurisdiction or was procured through fraud on the court that rendered it." (Petition at 23) In fact, *Pepper* makes plain that a bankruptcy court has broad equitable powers to "look behind" a state court judgment to determine *any* theory that would require the amount awarded to be disallowed or subordinated, as long as the state court did not previously adjudicate that theory. 308 U.S. at 304-05. *See Heiser v. Woodruff*, 327 U.S. 726, 737-38 & n.1 (1946) (central issue in *Pepper* is whether theory of allowability was decided by the state court). Thus, in *In re Bus Stop*, 3 B.R. at 27, the court refused to limit *Pepper* and its progeny to the "narrow" situation in which the state court judgment was procured through fraud.

Rule 60(b)(6)'s "grand reservoir of equitable power" protects against such manifest inequity.

In sum, even if the bankruptcy court erred in concluding that its prior orders and the law of abstention permitted it to reclaim jurisdiction over the case and decide the bankruptcy allowance issues, equitable doctrines nonetheless would have permitted that court to grant respondent relief from the unintended effects of the April 1993 order. The bankruptcy court's final order disallowing petitioner's claim for post-petition attorney's fees, interest, and costs therefore could be and was properly affirmed on either this alternative equitable ground or on the other grounds discussed above.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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